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CASE OF OLIVER SMITH'S WILL.[1]

This case has attracted considerable interest, on account of the amount which was involved, and the obstinacy with which it was disputed. The testator, Oliver Smith, was a farmer in Hatfield, in this commonwealth, who, by a long life of industry and economy, had acquired a large fortune. He had no family. His nearest surviving relatives were nephews and nieces, and they were not poor. Under these circumstances, he left a will, which contained some curious provisions for the distribution, or, rather, for the preservation of his estate.

The legacies to his relatives were very small, and he provided that the sum of $200,000 should be secured at interest, and managed as one entire fund, until it had accumulated to $400,000. This amount was then to be sub-divided into three funds. The first ($30,000) was to be secured at interest for *sixty years* longer, after which a portion was to be applied to the purchase of two farms — a "Model Farm," and an "Experimental Farm," and the remainder was to constitute a foundation for the support of a charitable institution on the premises, to be known as "Smith's

[1] The Evidence of the Validity of the Will of Oliver Smith, and The Arguments of Messrs. Choate and Webster, in the Supreme Judicial Court, at Northampton. With a Biographical Sketch, and a Copy of the Will and Probate Proceedings. By James W. Boyden, Attorney at Law. Amherst: Published by H. B. Nims. 1847.

Agricultural School." The second ($10,000) was to be appropriated to the use of the American Colonization Society. The third ($360,000) was to constitute a "Joint or Miscellaneous Fund," to be devoted to the benefit, first, of *Indigent Boys;* secondly, of *Indigent Female Children;* thirdly, of *Indigent Young Women;* fourthly, of *Indigent Widows;* the beneficiaries being confined to eight towns in the vicinity. The income of the Boys' Fund was to be expended in apprenticing the boys, and in lending them $500 for five years, and in case they conducted well, and paid the interest regularly, they were to have the whole at the end of the time. The income of the Female Children's Fund was to be expended in binding them out, and providing marriage portions. That of the Young Women's Fund was to be spent for marriage portions, which were in no case to exceed fifty dollars, and the Widows' Fund was to be devoted to the benefit of poor widows, who had children dependent upon them. The property which remained, after deducting the private legacies, and this sum of $200,000, was to constitute a contingent fund for supplying any occasional deficiencies in the Miscellaneous Fund. And it was especially provided that the Miscellaneous Fund should always be invested in mortgages of real estate, though the *interest upon the interest* might be invested in United States stock, or in stock of the several states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut and New York, or the cities of New York, Boston, and Albany.

This minute recital may weary some of our professional readers. But we thought we would give the details of this remarkable will, which rivals the famous will of Peter Thellusson,[1] in the evidence which it furnishes of the testator's morbid grasp upon his property, and his anxiety to protract the power of alienation as much as possible. The two wills also bid fair to vie with each other in the amount of expensive and embarrassing litigation to which they give rise. The American case is indeed superior to the English one, because it really manifests a strong desire to aid public objects and to provide for the wants of the poor. But we cannot altogether escape from the impression that the testator's grand object was to immortalize his own wealth, and to prevent the possibility of scattering that grand fortune, which it had required so much time and perseverance, on his part, to collect. This appears from the provisions he made for increasing it, and from his studious care to prevent investments in any great public enterprise.

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[1] *Thellusson* v. *Woodford*, 4 Ves. Jr. 227.

It is remarkable that the general plan of the testator was adopted some fifteen years before his decease, at which time a draught was prepared by Judge Hinckley. A will was soon afterwards executed, and different codicils were added from time to time. But on July 15th, 1844, a new will was executed, revoking all others, and a codicil was added on the 13th of August, 1845. The testator died on the 22d of December, 1845.

This will naturally caused great excitement, as soon as its provisions were known; and the heirs looked about for some way of questioning its validity. At first it was suggested that a question would be made in regard to the testator's competency to execute the will and codicil. But this was abandoned, and the case carried by appeal to the supreme court, where a trial was had between the heirs at law and the executor, upon the single issue, — "That the will and codicil thereto were not attested and subscribed in the presence of the testator, by three competent witnesses, — competent at the time of attestation."

The three witnesses were the lawyer who drew the will and his two sons. One of these, a young gentleman who graduated at Amherst college in 1841, had been for several years in ill health, and it had been sometimes thought that his mind was affected thereby. He had attested both instruments, and it became necessary for the executor to establish his competency. Upon this single point the whole case turned. The counsel for the executor called all three attesting witnesses.

The father testified that his two sons were merely called in to see the testator sign, and that the testator having signified a wish that they should sign as witnesses, they did so, and thereupon the sons left the room.

The testimony of one of the sons related chiefly to his brother's sanity. He stated somewhat at length that his brother, during the latter part of his college life, suffered from dyspepsia, on account of which he frequently went home, and that since graduating, he had pursued no regular employment — that in August, 1843, he went with his brother to the Worcester asylum to consult Dr. Woodward — that his brother was harassed by the thought that there was a conspiracy to injure him — that during that season he manifested great nervous excitability, was fond of solitude, and on one occasion went astray under circumstances which created apprehension — that his excitability was increased by a serious accident, which befell their father during that year — but that, the next year, his mental condition improved, though his retiring habits and depressed spirits did not entirely forsake him. This evidence was

corroborated by the young man's friends and college acquaintances. He was afterwards called himself and permitted to testify, notwithstanding the objection of the counsel for the appeal. From his evidence we make some extracts: —

"*Question.* Were you out of health the latter part of your college course? *Answer.* Yes, the last year. *Q.* What was the nature of your complaint? *A.* I was told by my physicians that it was of a nervous and dyspeptic character. *Q.* Did it, or not, oblige you to leave college the last part of your college career? *A.* It did, in the Junior year.

"*Question.* Did you take a journey to Boston, or the South? *Answer.* I did, the summer after I left college. *Q.* How far did you go? *A.* First, to Boston; and, there, I took a packet for Philadelphia. *Q.* What effect did it have on your health? *A.* My health was improved. *Q.* Do you remember when you returned? *A.* The fifth day of July, the summer but one after I left college. I made a little mistake. It was not the next summer, nor the next summer but one, — it was three years after I left college. *Q.* From this journey, did you return again to your father's house? *A.* Yes, sir. *Q.* Do you remember the accident that happened to your father? *A.* I have a general recollection of it; I saw a wagon with my father by a shed, and very soon heard it upset. Father was brought into the house. *Q.* Can you say whether that event alarmed yourself and other members of the family? *A.* It did, I recollect a great excitement, being much alarmed. *Q* What was the nature of the wound your father received, on what part of the body? *A.* An injury to the thigh. *Q.* Do you remember how long it confined him to his room? *A.* I do not. *Q.* How long after this did you go to Worcester? *A.* A few days. *Q.* What induced you to go to Worcester, at that time? *A.* The fright from my father. *Q.* Have you heard your brother's statement about your father's calling him in, about your apprehensions? *A.* I have an indistinct recollection, a general, imperfect memory of an apprehension, on my mind, of other persons.

"*Question.* How did you find yourself after your return from Worcester? *Answer.* No better. *Q.* Are you now conscious, after your visit to Worcester, you were in a state of excitement? *A.* I was in a state different from any other time. *Q.* How long did this excitement continue? *A.* Two or three months. *Q.* Did it particularly affect your spirits? *A.* It did. *Q.* After the change, how did you occupy yourself? *A.* It had got to be winter, and I was occupied in farm work. *Q.* Did you feel in better spirits, or were your ideas brighter and clearer? *A.* My ideas were brighter. *Q.* At these most unhappy periods, are you conscious of loss of your perceptions? *A.* I am conscious of mental delusion, rather than a delusion of sense. *Q.* Had your experience led you to read on the nature of such diseases? *A.* It had. *Q.* Was it Hypocondria? *A.* It resembled that more than any form I have read of.

"*Question.* What was the state of your health of mind and body, at the time of the execution of the will? *Answer.* My bodily health was not much improved, but my mind was good. I could occupy myself, so far as bodily health allowed. *Q.* Do you speak of any change, or improvement, particularly, that summer? *A.* My mind improved much at that time.

"*Question.* Have you, now, a distinct recollection of what took place at the signature of the will? *Answer.* Quite.

"*Question.* So far as you know, when you attested the will, was your mind as clear and strong, as when you wrote the book? *Answer.* I think it was. *Q.* Do you believe that your mind was as strong and clear, and your memory as good, when you witnessed the signature of the will, as they are now? *A.* Yes, sir.

"*Question*. Do you remember, distinctly, how many days after your father's accident, you suspected your brother? *Answer*. I am quite certain that it was shortly after. I recollect no particular circumstance, except the accident. *Q*. What woods were you afraid to enter? *A*. I recollect, at one time, a reluctance to go into the woods, north-east from my father's house. *Q*. How large is that piece of woods? *A*. I don't know whether it contains fifty or one hundred acres. *Q*. Is it on your father's farm? *A*. No, sir. It belongs to different individuals. *Q*. What did you suppose was there? *A*. I do not recollect. *Q*. Do you recollect talking of your apprehension that your body would be taken for dissection? *A*. I talked with Dr. Woodward about it. *Q*. Do you recollect fastening your windows nights, or getting up in the night, and going to the windows to see if persons were about? *A*. I have an impresion I did so, once in 1843. *Q*. Did you mention, or did you hear your brother Arthur speak to Dr. Woodward about your case? *A*. I have a general recollection of making some statement. *Q*. Have you a clear recollection of having, within the past year or two years, fear of your brother's being in a conspiracy to injure you? *A*. I think not. I cannot state positively what ideas have entered my mind for an instant. For a long time, I am confident that nothing of the kind has taken place. I distinctly recollect apprehensions of all the family, at one time in 1843, but these left me in two or three months. *Q*. To what did those apprehensions allude? *A*. General alarm, and fear of some indefinite injury. *Q*. Have these ideas come into your mind during past years, by way of recollection only? *A*. They have. *Q*. Have you not, when company came to your father's, left the room, or started for the door? *A*. I presume I did. *Q*. What did you go out for? *A*. I was reluctant to see them. *Q*. For what reason? *A*. I did not feel well, and was not inclined to conversation. *Q*. At the time you went to Worcester, do you, or do you not think you were insane? *A*. I think that I was. I was very well conscious of the state of mind I was in at the time, but I cannot describe it. *Q*. Do you clearly recollect, that you were conscious of it? *A*. I recollect, that I was in a strange state of mind, which I was very well conscious of at the time, but cannot describe. *Q*. When did that state of mind commence? *A*. Very soon after the accident. *Q*. Have you any recollection of describing your state of mind, before you came home from your journey? *A*. I do not. But there was some excitement after my return, and before the accident. *Q*. Did you go to your Uncle Huntington's? *A*. After I came home, I spoke to him on the subject of religion. *Q*. Do you recollect a serious confession to him, and asking his pardon for picking up his apples, when a boy? *A*. I have some idea of it. But the occurrence took place a long while since, when I was six years old. *Q*. Do you recollect anything about the next Sabbath after your return from Worcester? *A*. Yes. I do not know where I went, think I fell into the water, and was under some delusion. *Q*. Have you any recollection of the cause that led you to go away? *A*. I have not, except the general effect of father's accident. *Q*. Do you recollect that your father was in your thoughts? *A*. I do not think that, after the attack came on, I thought much about others. *Q*. Where have you usually been? *A*. In the family, as much as anywhere. *Q*. Have you not been a good deal by yourself? *A*. I think not, unless engaged, or resting. There is nothing, in the state of my mind, to prevent intercourse with members of the family. *Q*. Have you been very cheerful? *A*. I have been in a depressed, gloomy state of mind, that affected my spirits. *Q*. What caused your ill health? *A*. I suppose, want of exercise. *Q*. Has your health been uniformly bad, since you left college? *A*. It has. I have had a good deal of headache, and pain in my head, about the temples, as much as any part, — am never free from it, but it is not usually

very severe. *Q.* How do you distinguish between headache and pain in the head? *A.* I had pain in the head about the time I left college, something of oppression, which I never had before, and which I have had ever since. It is generally in all parts of my head and sometimes in the temples. I was leeched once, last December. The pain varies at different times. It has been a general complaint, I feel it now. *Q.* How long before the time you testified at the probate court were the leeches put on? *A.* A few days before. *Q* Did you take any medicine yesterday? *A.* I did. I take it every few days. It is prescribed by a physician. *Q.* Have you consulted Dr. Gridley? *A.* I have seen him a number of times; I consulted him in the winter of 1844, but I think not since. I afterwards saw Dr. Stacy. *Q.* Do you remember seeing Oliver Smith sign both of the papers? *A.* I am not positive of more than one occasion, that of the original will: but I distinctly recollect signing my own name twice.

Dr. Woodward, formerly of the Massachusetts Insane Asylum, Dr. Gridley, of Amherst, Dr. Brigham, of the State Asylum of New York, Dr. Ray, of Providence, and Dr. Bell, of the Insane Asylum at Somerville, were called as experts. Dr. Woodward was unwilling to pronounce the witness sane at the time the will was executed, but the others thought him competent to attest both will and codicil.

Here the case rested. An immense amount of property was at stake. The whole matter had acquired a painful notoriety in the little town where the testator dwelt, and throughout the whole vicinity. But the title to the property was not the only question. The jury were also called upon to decide as to the mental health of a young man of respectable connections, of liberal education, in the very morning of his life. Besides, it had become generally understood that there would be a trial of strength between two of the ablest advocates in New England — two gentlemen distinguished alike at the bar and in the senate — Rufus Choate and Daniel Webster. Under these circumstances, an immense audience collected, and the trial was watched with great interest.

The arguments of the closing counsel on each side are remarkable specimens of their respective styles. We take the liberty of making some extracts from the printed reports in Mr. Boyden's collection, beginning with the argument of Mr. Choate, who spoke first.

"To a valid will, the law gives absolute effect; and if the testator has complied with the *forms* of law, the will must be executed, however absurd or unnatural its provisions may be. Surely, such a will as this, could never have been anticipated; it was not to be *dreamed* of. It was natural that those, who had lived around him for fifty years, his relations by blood, should expect from their uncle, a bachelor, at least some token of his remembrance. Had he seen fit to divide between them and the devisees, regarding as well the claims of blood as of the public service, as we are now ready to do, the labor of this investigation would never have fallen to you.

"No doubt the owner of property, by complying with the provisions of the law, may disinherit the child of his loins. The law *first* provides for heirs, and says, that while a right will may deprive them of the inheritance, yet the *forms* of law must be strictly and rigidly followed. The reason why the law provides that property shall descend to heirs, in the absence of a will, is not that *somebody* may be made richer, but to save the rush and scramble that would ensue, if *everybody* had an equal right to the accumulations of the deceased. While a relative exists on the face of the earth, the law seeks him out, and not till the most diligent scrutiny fails to find an heir, will the law interpose to take such property for public uses. And this is according to nature and the eternal fitness of things. Therefore, in every code, by every lawgiver, in every age, the right of the heir at law has been held first and most sacred.

"Still a discretionary power is given to disinherit heirs. But it may be so cruelly, so suddenly, and so capriciously exercised, as to disappoint the most reasonable expectations. Therefore, while the general power is sacredly secured, every law provides a great variety of *forms*, complying with which, the testator may disinherit his child; but failing to comply with them, *there is no will*. The ties of blood are then regarded. Then the first and the last will is the will of the law.

"The will of Oliver Smith is not according to the forms of law.

"The law requires that every will be attested by *three* competent witnesses — competent to inspect the mind of the testator — competent to judge of the whole transaction. The principal object of this provision is, to protect the heirs at law, and in a limited degree, only to protect the testator. For the protection of the heirs, the law provides that the testator shall be surrounded by three competent witnesses, to read the mind of the testator. In the present case we have not such witnesses. We are entitled to three *minds*, and not to three *bodies* merely. We are entitled to three *whole* men — men independent of each other, but we hav'nt got them.

"Generally, men do not make their wills until old age or sickness is upon them. It is when the testator approaches the line of imbecility, that the security of witnesses is required, lest cunning men come between him and his child.

"Whatever might be the character of his disease, the witness was not able to perform the function required of him. In this case, particularly, should the jury require the utmost and strictest evidence of competency. The witnesses were a father and two sons — not three independent minds. No one ever sat on a jury with two of his sons.

"Look at the manner in which the transaction was done? What was done to test the capacity of the testator? Nothing at all. Here was an old man, upon the verge of the grave. Neither of the witnesses were acquainted with him — never had spoken a word to him, and scarcely knew him. They were called in. The testator was asked if it was his last will and testament, and if he wished the witnesses to sign it. He said, yes. They signed it and went away. The whole transaction was without the *forms* of inspection.

"Witnesses to a will should be perfectly sound in mind. What are they to do? As before stated, they are to surround the testator, to protect the heirs at law. They are to *try the testator's mind*. Think of such a witness trying the capacity and sanity of Oliver Smith? The witnesses are to protect the testator, whose hands may have outlived his head, from imposition.

"To perform such a function, the witness must possess quick perception and close observation. The mind that reads the spirit, must be free from morbid influences, and must be in a perfectly normal state.

"He (the witness) went to college. For the first, second and third years, he was cheerful and social, and in these respects, in no way unlike his fellow students. In the latter part of the third, or the beginning of the fourth year, he was taken sick, not of common disease, but of a morbid disease of the *brain*. He went home once or twice, and was unable to perform his part at Commencement. It was then that he dropped *mentally dead*, — that day his mind died. Then began that strange pain and oppression of the head, from which he has never since been free. From that hour to this, a settled gloom has hung over him like a pall. His occupations in the field, and in the composition of his book, were struggles to work off his feelings. Life from that time, save the brief period of mental excitement in 1843, has been to him a long sleep of the soul. For six years he has not entered the house of a neighbor; for six years he has not enjoyed the calm air of a house of worship. He has been ever eating his own heart.

"In August, 1843, he was not mad for the *first* time, but *differently* mad. He then became visibly and openly insane. His eye, which was to inspect the mind of the testator, saw a conspiracy in his own brother. To escape from this, he attempted suicide. It was a disease of the brain — of the nervous system. Such a witness is not what we are entitled to by law.

"His (the witness's) mind never turned on the accident to his father. His disease existed certainly a month before the accident, on his return from Philadelphia; and whether it commenced at the close of his college life, or not, it is indisputable that it existed from July, 1843, to December or January following. Unless, then, the other party show that after that time the disease was removed prior to July, 1844, the presumption is that he continued insane until that time.

"The testimony in the case fails to show whether, or not, the insanity was so removed. If he were now on trial for perjury in 1844, would you convict him? The law would not hurt a hair of his head. It is of no consequence whether he be restored at the present day — that is wholly collateral to the issue.

"His own account does not prove such restoration. In this, Dr. Woodward and Dr. Bell agree. On the contrary, it proves him to have been incompetent to attest the will. He was there present; but he now remembers the signing of only one paper by the testator. His mind was not there; he was brooding over some delusion.

"He gives no reason for his recovery in December, 1843; none has been given. The same bodily disease continued, as before that time.

"All that has been offered in evidence to prove his restoration before the attestation of the will, is reconcilable with the continuance of his disease. An insane man can labor in the field, can compose a connected book, can take delight in reading.

"But the medical men, who were called hither as experts, rely upon the fact that the *family* did not notice insanity, as evidence almost conclusive that none existed; but it is not; they constantly avoided probing him. When he came home from his attempt to commit suicide, not one of them asked him a question. His brother never inquired why or how he supposed that *he* designed to injure him. Insanity unquestionably existed in 1843, yet none of the family suspected it."

Mr. Choate then recapitulated his three principal positions, which were,

"1st, that insanity having been proved near the beginning of 1844, the burden of proof was on the other party to prove a restoration in July following.

"2d, that the testimony offered for the purpose was reconcilable with continued insanity.

"3d, that every cause of his insanity at any time, is shown to have existed when the will was attested."

He concluded by a disquisition upon seclusion as a cause of melancholy and madness, quoting, with great effect, from Burton's Anatomy of Melancholy, the injunction to those disposed to insanity — "*Be not solitary, be not idle.*"

Mr. Webster then addressed the jury, first observing that there was nothing extraordinary in the case.

"It involved the attestation of a will. There may be interesting circumstances around it. The case turns a good deal on the character of a young man. The property is large. The heirs are disappointed. There is enough to make a scene and a picture. There is the canvas, and, as you have seen, there is a master. Things have been presented in a dramatic form. Dramas are made from common occurrences. The hand of a master gives them interest. The scenes of Shakspeare are more interesting now than when they occurred. It is a common remark, that Apollo and Venus and all statues are but human works wrought out of rough stone.

"Your duty is, to take the common view — to go to the real and substantial facts. The question is the will of Oliver Smith. He made a will, and disposed of his property in charities. The heirs are said to be disappointed.

"He was a bachelor, and left no brother or sister. His nephews and nieces are worthy persons, but they were not members of his family. Nor are they necessitous. I do not suppose that their rights are violated. You must distinguish between expectations and rights.

"I suppose I shall administer relief in reading the issue — [which was, that the will was not properly executed, on account of the incompetency of one of the witnesses, by reason of insanity.] Out of the issue, you have no more to do than the crier of the court. The will may be a good will, or it may be a bad will. With this you have nothing to do. One of the reasons of the appeal has been abandoned. It is agreed that Mr. Smith was of sound mind. In one aspect, then, it is a mere question of form. No question is raised about the capacity of the testator. But this does not dispense with the necessity of three attesting witnesses. The law requires it. Property is the creature of law. Man has a right to what the law gives, in substance or in form.

"Now what is a competent witness under the law? Must he be an expert? If so, he must be a doctor. Must he be a skilful? Every one knows it is common for a man to call in his cook, or his chambermaid, or his stable boy, to witness an instrument. I differ from Lord Camden as to the necessity of a witness being capable of '*inspecting*' the testator's mind. We know of no such practice, except so far as this, that a witness would wish to know whether the testator was of sound mind and memory. When a respectable old man rides over, on a morning, from Hatfield to Hadley, in a chaise, and promises to execute a will; reads it, and calls in young men to witness it; such an idea as the young men inspecting and catechising that old man, would be new in Massachusetts. The idea of 'inspecting' the testator's mind arose in this way. In former times, there were no witnesses to wills. A notorious case of fraud occurred in the time of the English Commonwealth. A testator went to one Baynam, a lawyer, to make his will. Lawyers are not always as honest as they should be. Baynam

made the will, and Baynam was the only witness, and Baynam was the principal legatee to the whole estate. This will was sustained, and by Lord Camden. This led to a reformation of the law and the statutes, from which we have borrowed. The law intended that witnesses should be disinterested — competent. I know of no law that places the competency of a witness to a will on any other or different ground, than a witness in any other case. Any competent witness in a court of law is a competent witness to a will. He must have intelligence and not be infamous. A witness competent to testify in a case of assault and battery, is competent to witness a will. This has been decided to be the doctrine of this court. All that is required is disinterestedness and freedom from infamy. Chief Justice Parsons says, 'witnesses are credible (competent) whom the law will trust to testify at the trial.' They must have understanding to know the nature of an oath. All competent witnesses are sufficient inspectors and guardians. If in July 15th, 1844, the witness was a person who could be sworn in an assault and battery case, he was competent to witness this will. The great thing to be guarded against is incompetency on account of interest.

"We will prove anything the case requires. Presumption is in favor of sanity. They who deny sanity, must prove insanity. We must go on the facts in each case. If a man's mind is capable at the time, of doing what he undertakes to do, he is competent. The insanity must appear to be incurable, like a malady from a blow on the head. If insanity is temporary, or coming and going, no such inference arises.

"It is not every degree of insanity, that incapacitates a man for business. A witness must have power and intellect enough to apply his mind to the subject before him. Incipient madness could not incapacitate a man for business. Look at the practical results of the theories set up here. A man is competent to do anything he undertakes to do; and yet the doctors prove a lurking insanity, which unfits him for business, and exempts him from crime.

"The precise test in this case is this. If the person whose sanity is questioned, had been brought into court, as a witness, on the 15th of July, 1844, he could not have been rejected as a witness. The other side resort to theory. Call in the doctor. 'Canst thou not minister to a case diseased?' There were no witnesses to show insanity on the 15th of July, 1844. Witnesses are false, or else the witness was competent. The other side were brought into the unenviable position of defeating their own cause. They have knocked away their own platform. They made no objection to the witness on the stand. The counsel spoke of him as mentally dead — dead — dead! Can a dead man testify?

"Experts had been called to give their opinions agreeably to modern progress in the diagnostics of insanity. I am content with Locke and Reid. The theory of Dr. Woodward is, that if ill health continued, derangement continued. But he says that the state of mind, at the time of the transaction, is the true test to be regarded. He thinks the mind could not have been clear. Other evidence is that it was."

Mr. Justice Wilde then charged the jury, that one who might have been admitted to testify in court, immediately after attesting the will, was a competent witness within the statute — the burden of proof being upon those setting up the will. Upon this the jury, after being out an hour, returned a verdict establishing the will.

It is an odious task to compare counsel. But, in this case, the arguments produced an impression, which entitles them to be con-

sidered as models of two very different schools of forensic eloquence. Both gentlemen hold the highest rank in the profession, being eminently popular, as well as learned, advocates. Both are numbered among the scholars of the country. Both are distinguished in political life; and, though one has retired from the senate, after having captivated his colleagues by his genius and acquirements, the other remains, the object of an almost idolatrous veneration by the people of this commonwealth. Yet they are wholly unlike. Nor can we deny a strong partiality for Mr. Webster. We admire that severe simplicity which characterizes all his efforts, and that willingness to rest his case upon a plain statement of its facts, without permitting any artifice to cloud the dignity of truth. It was remarked by Mr. Justice Chase, after the trial of his impeachment, that he admired Luther Martin's argument most of all, because it was impossible, while he was speaking, to think of anything but the case, but each of the others drew attention to themselves. Similar praise is due to Mr. Webster; and it is the most conclusive proof of his own greatness, that he can content himself with the simple performance of his task on the most exciting occasions, and even when it is evident that the greatest cause of excitement is his own presence.

In this case Mr. Webster appeared to great advantage. His opponent had availed himself to the utmost of the excitement of the occasion. He had dwelt at length upon the question of insanity, and he had applied, with great effect, the doctrine of Lord Camden, that an attesting witness should be able to inspect the testator's mind, that he might prevent the heirs from imposition, in case the testator's "hands may have outlived his head." Yet his whole fabric was overturned by Mr. Webster's simple suggestion that the whole case might be reduced to a struggle for property on the part of heirs, who having been exasperated by an absurd will, had confounded their rights with their expectations.

Mr. Choate is certainly one of the most gifted orators in New England. A brilliant intellect, which has been developed by exact and laborious study, a wonderful power of discrimination and abstraction, an exuberant flow of language, a sparkling wit, a lively fancy and an overwhelming enthusiasm, enable him to control almost any audience, and entitle him to the name of the American Erskine. Yet, with many of Erskine's excellencies, he has some of his failings. Among these may be included a strong love of the marvellous, and a disposition to make too much of small things. As Hamlet would say, he almost tears a passion to tatters, in his anxiety to bring everything to bear upon a single point. This is a

great element of rhetorical power, but we doubt whether it be in good taste in a court of justice, where the object is to convince, and not to carry by storm. On the contrary, we think that Mr. Webster's success in this case has vindicated the justice of his own remark on another occasion, that "clearness, force and earnestness, are the qualities which produce conviction."

The only point of law which was mooted at the trial was suggested, as we have said, by Mr. Choate, who cited a case, (we suppose *Hudson* v. *Kersey*, 4 Burn's Eccl. Law, 102,) wherein Lord Camden expressed an opinion that the witnesses to a will should be able to inspect the testator's mind. This case was held to be inapplicable to the extent Mr. Choate desired. The correctness of this ruling under the statute cannot be questioned; yet the evil complained of is so great, and Lord Camden's remarks exhibit so much common sense, that we venture to quote a few sentences as illustrative of what many think the law ought to be.

"——— Who then shall secure the testator in this important moment from imposition? Who shall protect the heir at law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive, here they are active, and in truth the principal parties to the transaction, the testator is entrusted to their care. Sanity is the great fact the witness has to speak to, when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *viva voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity. From the same consideration, it is become the invariable practice of that court, never to establish a will, unless all the witnesses are examined; because the heir has the right to proof of sanity from every one of them, whom the statute has placed about his ancestor."

Note. — We have not been disappointed in our anticipations of renewed litigation under this will. We learn from the newspapers, that the heirs are not satisfied with their failure to break the will, and have resorted to another method of interrupting and delaying proceedings. They contested the validity of the election of the trustees, who had been chosen at town meetings holden for the express purpose. The will required that they should be chosen at the regular town meetings. The supreme court decided, at the late term in Northampton, that the choice was invalid, inasmuch as no exigency had occurred to require an election at any other than the *annual* town meeting. Consequently a new election has become necessary.

Recent American Decisions.

Supreme Court of New York, July Term, 1847.

THE PEOPLE *v.* JOHN BROOKS.

A state law, imposing a tax upon the *officers* and *crew* of vessels coming within the state is unconstitutional, because it conflicts with the power of the federal government to regulate commerce, which power has been exercised by congress.

THE facts of this case will sufficiently appear in the opinion delivered by

BEARDSLEY, C. J. By the legislation of this state, every master of a vessel from a foreign harbor, or of a coaster arriving at the port of New York, is required to pay a certain sum for each person on board, whether passenger, officer, or one of the crew. It is not material here to state the particular sums to be paid on different classes of persons, or the use to which the money is to be applied. The object may be purely benevolent and charitable, and the sum demanded but a mere trifle; still the legal character of this exaction does not depend upon, nor will it be at all affected by, such considerations. It is important to note the distinction between payments required to be made for passengers, and such as are demanded on account of the officers and crew of a vessel. In the case of *Turner and Smith*, (not reported) this court held that the statute imposing a tax on passengers was constitutional. That judgment was affirmed by the court of errors, and no doubt is entertained of the correctness of that decision. But the present case has reference to a tax on the *officers and crew* of the vessel; and the penalty is sought to be recovered for a refusal by the master to pay that tax. It is obvious that this is very distinguishable from a tax on passengers, and that the validity of the state law, as applicable to the two cases, depends on very different considerations.

Passengers, as was said in the case of *The City of New York* v. *Miln*, (11 Pet. 136,) "are not the subject of commerce;" nor are they, like the officers and crew of a vessel, indispensable agents of navigation. A tax on the former may not, therefore, be in any sense a regulation of commerce, although a law imposing a similar burthen on the officers and crew might be well regarded as of that

character. Congress, as the constitution of the United States declares, have power "to regulate commerce with foreign nations, and among the several states." (Art. 1, § 8, Sub. 3.) The word commerce, as here used, is not limited to the mere buying and selling of merchandise and other commodities, but comprehends the entire commercial intercourse with foreign nations, and among the several states. It includes navigation, as well as traffic in its ordinary signification, and embraces ships and vessels, as the instruments of intercourse and trade, as well as officers and seamen, who navigate and control them. The power of regulation vested in congress extends to all these subjects. *Gibbons* v. *Ogden*, (1 Wheat. 189, *et seq.*); *Brown* v. *The State of Maryland*, (12 Id. 445–8); *City of New York* v. *Miln*, (11 Pet. 134–6, 141, 154–5.)

This power has been exercised by congress in the passage of a multitude of acts on the subject. Of this description are the laws which provide for the registry of ships and vessels engaged in foreign trade, and the enrolment and license of coasters and fishing vessels. And of the same nature are those which require the payment of small sums at stated periods by all seafaring persons on board the ships or vessels of the United States. These laws impose burthens, as they also confer privileges, upon all persons engaged in the business of navigation; and they all rest on one and the same foundation, the power vested in congress "to regulate commerce with foreign nations and among the several states." It is not intended to analyze or enumerate the various laws on this subject, and reference will only be made to one or two of them.

"An act for enrolling and licensing ships or vessels to be engaged in the coasting trade and fisheries, and for regulating the same, was passed in 1793. It declares that certain ships or vessels, "and no others, shall be deemed ships or vessels of the United States entitled to the privileges of ships or vessels employed in the coasting trade or fisheries." (1 Story's Laws U. S. 285, § 1.) And by the fourth section of said act, on giving a proper bond, and paying the duty required by law, a license to carry on such trade or fishery is to be given.

By the "act for the relief of sick and disabled seamen," passed in 1798, it was made the duty of "the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States," to render a true account of the number of seamen employed on board such vessel since the last entry at any port in the United States, and to pay to the collector "at the rate of twenty cents per month for every seaman so em-

ployed, which sum he is hereby authorized to retain out of the wages of such seamen." (Id. 544, § 1.) A like payment to be retained out of the wages of every seaman employed in the coasting trade is also required to be made by said act. (§ 2.) And a similar payment is to be made by "the officers, seamen and marines of the navy of the United States." (Id. 685, § 2.) These moneys are designed for the temporary relief and maintenance of sick or disabled seamen; and if a surplus shall remain, it is to be used in providing hospitals for the accommodation of such persons. (Id. 554, 685; 2 Id. 879, 1186.)

The mere grant to congress of a power to regulate commerce may not, *ipso facto*, have deprived the states of a concurrent power; but the power vested in congress has been exercised in the manner and to the extent deemed proper by that body; and the regulations thereby made are in full force.

By these regulations, burthens are imposed on seamen as well as ship owners, and the precise question is, can additional burthens now be cast upon them by the states. In other words, can a state tax the occupation of a mariner employed in the foreign or coasting trade or in the fisheries; or is not the payment of monthly dues to the United States an unqualified license and authority to pursue this occupation without let, hindrance or impediment of any sort, from state authority? For myself, I think nothing can be plainer than that this is a power which a state cannot exercise. In principle, I see no difference between the case at bar and that of *Brown* v. *The State of Maryland*, (12 Wheat. 419. It was decided, in that case, that an act of the state of Maryland, which required importers of foreign goods by the bale or package to take out a license to sell the same for which fifty dollars was to be paid, was repugnant to the power vested in and exercised by congress, "to regulate commerce with foreign nations." (p. 436, 445, *et seq.*)

"Sale," say the court, "is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importers to sell. (p. 447.) Again, same page, "What does the importer purchase, if he does not purchase the privilege to sell?" And in conclusion, it is said, "Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation." "The distinction between a tax on the

thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce." As to the acknowledged power of a state to tax its own citizens or their property, it was said, "We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce." "It cannot reach and restrain the action of the national government within its proper spheres. It cannot reach the administration of justice in the courts of the Union or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. (pp. 448–9.)

So in the case at bar, what right does a mariner purchase by the payment of his monthly tax to the United States, or the master who pays a legal duty on his vessel, if a state may step in and impose additional burthens on one or the other? What right is secured by the license to pursue the coasting trade, if its exercise may be obstructed or shackled by state regulations? Obviously no such power should be possessed by a state. It should not be allowed to obstruct or impede the constitutional action of the general government, nor can it impose taxes or duties in any form on what that government has authorized. (Sec. 4, *Id.* 425, *et seq.*)

In the present case, the Nimrod had been enrolled and licensed from year to year to engage in the coasting trade. Consequently her crew had from time to time paid monthly dues to the United States; and those on board were liable to make similar payments. (1 Story's Laws U. S. 554, § 2.) What was gained by this payment, if not the right to follow the occupation of a mariner in absolute independence of all state control? If this occupation may be taxed by New York, it also may be by every other state into which the mariner enters in the pursuit of his calling; and in this manner the unity and harmony of the regulations of congress will be effectually destroyed.

In exercising the power to regulate commerce, congress may "make all laws which shall be necessary and proper" for the purpose. (Art. 1, § 8, Sub. 17.) Such as were deemed necessary or appropriate have been made; and they form a part of the supreme law of the land. (Art. 6, § 2.) As such they unavoidably exclude all state legislation which would in any degree change or modify the system of congress. The states cannot add to the regulations made by the paramount power of congress, nor subtract anything from them. The subject-matter having been acted upon by congress, was thereby placed completely beyond the reach or

control of the states. (9 Wheat. 197, *et seq.*) ; 11 Pet. 158 ; *Steamboat Co.* v. *Livingston*, (3 Con. 743.)

I must admit that I feel no doubt about this case. It seems to me to rest on the precise principle which was stated as one ground of the judgment in the case of *Brown* v. *The State of Maryland*. In my opinion, the legislation of the state on which the present action is attempted to be maintained cannot be upheld. It conflicts with regulations which have been made by congress under and in accordance with the constitution, and is necessarily inoperative. The laws of congress are paramount, and the legislation of the state must give way. On this ground, then, as well as on that first stated, there should be a new trial. New trial granted.

Circuit Court of the United States, Massachusetts District, October, 1847, at Boston.

G. B. WESTON ET AL. *v.* G. R. MINOT ET AL.

If goods are landed at the wrong place by the master of a chartered vessel, and then reloaded, the expense must be borne by the master or owners ; though if, during the master's illness, they are landed by the mate, at the request of an agent of the charterers, the latter is liable for the expense.

Where a vessel is chartered to another for a voyage to Calcutta and back, to carry all lawful goods placed on board, and for a gross sum for freight out and back to the entire capacity of the vessel, it must be considered to mean all goods not contraband nor diseased ; and as many of them as can be put on board without making the vessel draw too much for safety.

If the charterers were to pay the expense of steam to tow the vessel to sea, in case she should draw over seventeen feet of water, and they should order the use of steam, they were not held liable when the vessel drew over eighteen feet and used steam, if they gave no such order, and if vessels often went down to sea without steam, though drawing over seventeen feet.

The master of a ship may refuse to receive goods, before his ship is full if the charterers have already put on board such heavy articles that she is sunk as low as is consistent with safety. The tests of safety are, the depth the vessel was built to draw ; the depth her officers, in several years' experience, had found to be sufficient ; the depth those of experience, on the spot, after careful examination, reported to be proper ; and the depth to which several other vessels, at the same time and place, were loaded.

If the vessel thus took on board in weight nearly double her measured tonnage, and was in good repair and well manned, she was not a defective or imperfect vessel ; though she would not bear filling up entirely with a cargo, most of which consisted of such heavy articles as saltpetre and linseed.

A survey of the vessel by other sea captains, who reported and swear to the truth

of the result, is not conclusive as to her proper depth; but is a sound measure of precaution in a dispute between the master and the charterers.

Freight cannot be apportioned unless, from some expression in the contract, the nature of the voyage, or some act of the hirer of the vessel, or measure of the government, an apportionment becomes feasible and just.

The court inclines to sustain the conduct of a master, whenever it seems to have been the result of a watchful care over life and property, if it be done openly, after full notice to the other party, and under circumstances not indicative of extreme timidity or selfishness.

This was a libel in admiralty, alleging that the libellants were owners of the ship Mattakeeset, and in August, 1843, chartered her to the respondents for a voyage from Boston to Madras and Calcutta and back to Boston; that the plaintiffs were to keep the vessel in good condition, and take on board such goods as the respondents offered, to her entire capacity; that she did take a full cargo of ice at Boston, with certain other articles, and delivered them safely to the agents of the respondents at Madras, and brought back for them to Boston safely another cargo of saltpetre, linseed, &c., and were entitled by the charter to receive therefor $13,000, with charges and pilotage in foreign ports; that as the vessel drew over seventeen feet, the expense of taking her down the river from Calcutta by steam was properly incurred and chargeable to the respondents, which with the other charges and freight amounted to $13,856.

The answer admitted the charter-party, and also, if allowed to use the whole room of the vessel, the amount to be paid therefor, and admitted the liability to pay the expenses in foreign ports, not exceeding one hundred rupees; but denied the liability for the cost of towing the vessel to sea by steam; and also denied that the vessel received at Calcutta such goods as they offered to put on board, or enough to fill her up, but left vacant forty or fifty tons, and a large space within decks, sufficient to cover $1920 worth of freight from Madras to Boston. The answer also claimed a forfeiture of all freight by means of this refusal to let the vessel be filled up. It also claimed damages caused by neglect in stowage, improper landing of goods at Madras, &c.; and alleged that $2,028 07 had been advanced in India on account of freight.

The charter-party was given in evidence, dated August 15, 1843. It was in substance as set out in the libel, including the usual printed clause in the forms, to receive on board "all such lawful goods and merchandise" as the charterers "think proper to ship;" — and after the agreement to pay $13,000 for freight, a written clause was added, "in full for the entire capacity of the

ship out and home." The provision in the charter-party as to pilotage was, not to pay for the use of steam up and down the river, unless ordered by the respondents.

Much evidence was put in as to the fact, whether the vessel was loaded homewards as full as was safe; and as to the actual depth of water she drew out and back; how near her decks were to the water's edge; how much of her was not filled up; the propriety of towing her to sea by steam; the size and form of the vessel; the damage done the cargo; the negligent landing of some goods at Madras, and various other matters, bearing on the points in controversy. On some of these topics the testimony was contradictory, and in others uniform.

The case was argued at an adjourned session in September of the May Term, 1847.

Charles P. Curtis and *E. D. Sohier*, for the libellants.
F. C. Loring and *William Minot*, for the respondents.

The opinion of the court was delivered at the October term by

Woodbury, J. It may be well in the outset to separate the points in this case which are not now in controversy, from those which are; and, among those which are, to dispose of them first which are least difficult and least important.

The plaintiffs are now willing to allow the $28 99 for damages on the cloths; the $414 01 for damages on the home cargo; the $40 42 for articles missing; and $2007 20 for money advanced to them abroad towards freight. The evidence and law in relation to these need not, therefore, be examined.

The claims left and still contested, are the $45 49 for expenses by the respondents in reloading certain articles at Madras, which should not have been put ashore there; and the two claims made by the libellants for a steamboat to tow the vessel to sea, and for the general balance for the freight and charges in foreign ports, after deducting the expense and advances made by the libellees. In respect to the first matter in controversy, it is true that the master of the vessel should not, of his own accord, have landed articles at Madras, which by the papers on board were to be delivered at Calcutta.

But in relation to this, it appeared in evidence that the master was then indisposed, and these articles were put on shore at Madras by the mate, under the request of the supercargo of the respondents.

As the efficient cause of the mistake was the request of the supercargo, the agent of the respondents, and a delivery was

made in the master's necessary absence, it would be inequitable to consider a compliance with this request by the mate as such a neglect as ought to relieve the respondents from the expense of the wrong of their own agent.

They should not devolve it on the plaintiffs, whose subordinate officers did nothing but attempt to oblige the respondents, and those in charge of their concerns. In regard to the claims by the plaintiffs, the first one for payment for the use of steam, I think must be disallowed. It was beforehand expressly provided in the charter, that no payment should be made by the respondents for such steam, unless it was directed by themselves. Thus "if steam is used up and down the river, it is at the owner's expense, unless ordered by the charterers." There is no pretence here that they gave any such direction, verbally or in writing, but only that it was virtually given by their acts in loading the vessel at Calcutta so deep as to draw eighteen feet and a half on an even keel, when the regulations of the port did not require a pilot to take a vessel to sea without steam, if she drew over seventeen feet. One may become liable by his acts different from his words. (10 N. Hamp. R. 558.) But it was proved, as a farther fact, that pilots might, if they pleased, take vessels to sea without steam, though drawing over seventeen feet; that this was frequently done, and that most of the vessels in the Calcutta trade with full cargoes went to sea drawing over seventeen feet.

Under these circumstances, presumed to be known to both parties, it cannot be inferred that the respondents, by loading the vessel so as to draw over seventeen feet, meant to request the use of steam, and thus become liable for it. It was not an unusual depth, not one always accompanied by steam, and not one where steam was indispensable. Being then not ordered by words or acts of the respondents, the expenses of it must, under the provision of the charter-party, looking either to a strict or liberal construction, be considered as incurred on the responsibility of the owners of the vessel, rather than the charterers.

The next, which is the last and most important question, is the liability of the defendants to pay the sum for freight stipulated in the charter. This question becomes one of more interest here, as the defendants contend that they are not answerable *pro rata* for the full freight out and for that home, after deducting the space or number of tons left vacant, but are exonerated entirely from the whole, because something short of the whole was not allowed to be filled up, when requested by them.

Their reasons, assigned for this apparent strictness, are, that the

contract of affreightment for the voyage out and back was one, or a single contract, and cannot be apportioned; the contract having been for all the ship, her "entire capacity," and not a portion of it. They contend farther, that in case of freight usually, the whole engaged to be delivered is to be delivered as a condition precedent to receive freight, and the failure, even by perils of the sea, to carry safely all, is a loss or forfeiture of freight for all, when the price payable was a single or gross sum, and not so much per pound, barrel or ton. In support of this, see 3 Kent Com. 227; 2 Holt Shipp. 145; 10 East, 295; 7 D. & E. 381; 2 Levinz, 124; Abbott Shipp. 246. By some cases, nothing is considered due for carrying a part of the whole which was stipulated (7 Conn. 358; 2 Mass. R. 147; 3 Sumner, 554; 2 Johns. 356; 1 Johns. 24; 15 Johns. 332.) Carrying the whole, and for the whole voyage, is regarded often as a condition precedent. (1 Bulst. 167; 2 Barn. & Ald. 17; 8 East, 457; 6 Whart. 442.) It may be such a condition if in its nature it precedes what is to be done, or is the root of it. (Abbott Shipp. 253, 266; 12 East, 381; 10 Ibid. 555; 3 Bing. N. C. 355; 20 Pick. 438.) While, on the contrary, the plaintiffs insist, that where an apportionment in such cases is feasible, it is equitable to make it; that a court of admiralty is to be governed by equitable rather than strict common law principles. (2 Sumner, 449); *Dean* v. *Bates*, (2 Wood. & Min.) Indeed, Spence (Eq. Jur. p. 17,) says that admiralty powers were once exercised in the court of chancery. It is further insisted here, that the full freight out can be assessed on the ratio it bears to a full freight home, if considering the former as less valuable in voyages of this kind. And that the freight home can be apportioned for the quantity filled up, compared with the whole, or with such as ought to have been filled up.

This last course certainly seems the more just, and is less penal and technical. Compensation is to be made rather than a forfeiture if it can be legally, (2 Story Eq. Jur. sec. 1313 to 1316.) This at the same time would allow a recovery by the respondents, or a deduction for any peculiar damage they may have sustained for not being allowed to send in this vessel, or so soon, or on so good terms the quantity of merchandise not taken, which ought to have been taken. (Abbott on Shipping, 253, 270, 480 note; 6 Munford, 34; 10 East, 530; 1 Camp. 377; Poth. Mar. Law, 25; Holt on Shipping, 37; 8 Taunt. 516.) This would seem peculiarly proper as the rule, rather than a forfeiture of the whole freight, for the very small omission, or departure from the contract to carry all the vessel could. And this departure, happening not from wilful

ness, caprice, neglect or malice, but a mere error of judgment or mistake in fact. Yet candor compels me to say, that the cases in point which support this last view are rare, however plausible in appearance may be some of the appeals in it to equitable consideration. Perhaps if the contract be indivisible in terms, and the parties make no express exceptions, the true rule will be found to be, that the voyage must be treated as a whole, and the cargo as a whole, and no freight be recoverable, if not all, with only such exceptions as will be enumerated. (Abbott on Shipping, 406, 455, note; 3 Johns. 335; 1 Dods. Ad. 317; 12 Whart. 383; 1 Mason, 43; 3 Greenl. 1; 5 Mass. 252.) An attempt in Parliament by statute to exempt owners from liability for goods, &c. unless injured or lost by default of owners, officers and crew, has been made but failed. (Abbot on Shipping, 383.) It is truly said, that generally the parties are competent to make their own contracts; and if not choosing to insert proper limitations and restrictions adapted to ordinary events, should not complain if they are required to abide by the consequences of their own neglect.

But, on the contrary, if relief can be extended without violating the spirit or equity of the contract, it certainly should be, and so if the case comes within any of the exceptions just referred to. Thus, if the vessel is prevented by a blockade from completing her voyage, still the owner may recover freight, *The Friends*, (1 Eden R. 246); or if the cargo be lost by leakage, decay naturally, &c. (2 Johns. 327); or if it be sold by the shippers, or accepted short of completing the voyage. See former cases, (1 Taunt. 66, 530; 4 New. R. 261; 2 Caines, 394.) Or, if there be a refusal to permit its landing by government, (4 Dall. 455; 3 Kent, 222) So if it be not full freight, or if it be not delivered by default of the shipper, freight may be recovered, (Abbott on Shipping, 406 note; 1 Story, 355; 2 McLean, C. C. 422; 3 Swanst. 542; 3 Kent, 228; 4 Mass. 229; 16 Johns. 346.) Or, if it be properly thrown overboard in a storm, (1 Spear's R. 321 *seq.*; 2 Johns. 327.) Some cases hold, as between owner and shipper, if parts of the cargo are lost at sea, the owners of the ship may recover freight for them, *pro ratâ itineris.* (4 Mass. 221; 5 Mass. 252; Park. Ch. 2, p. 70; Abbot on Shipping, 443 note, 455 note.) This is perhaps if the rest reaches the shipper's hands, (443,) or is accepted; (1 Johns. Cas. 377; 2 Johns. Cas. 443; 2 Caines's R. 13; 2 Johns. 323; 9 Johns. 186; 1 Johns. 124; 7 Cranch, 358; 6 Cowen, 504; 3 Pick. 20.) Some cases also allow a recovery in a proper action, *quantum meruit*, though not able to succeed on the special terms of the charter, (Abbot on Shipping, 459; 2 Bing. N. C. 555.) But it

is not necessary to go into this further, to settle this point definitively, here; as, in my view, under all the facts and circumstances of the case, the plaintiffs appear to have substantially fulfilled the charter-party. So another question might arise, not mooted, and hence not decided, whether a party can recover back what has been advanced, in a case like this, if the contract has not all been fulfilled. (On this see Abbot on Shipping, 408; 3 Pick. 20; 3 Johns. 335.) But believing it was fulfilled, I hasten to see what was required by the terms of the contract, and then to show that those requirements were complied with substantially.

That part of the contract stipulating to receive all such lawful goods as the defendant should offer to put on board, is an ordinary one in the printed forms, and in my view refers to the kind rather than amount of goods — to their quality, and not quantity.

If lawful, or not contraband (Abbott on Shipping, 347, last edition), nor diseased, they are to be received, whether heavy or light, bulky or compact, agreeable or disagreeable; and this must be the only reasonable signification applicable to that provision. If it meant otherwise, and subjected the owners to receive any quantity of goods, however heavy, which the shippers might choose to offer, the vessel might be so overloaded with heavy articles as to sink at her anchorage before full, or go down in the first gale, and, when not insured, she might be an irremediable loss to the owners; while the charterers might risk and escape suffering by a high insurance on their goods. And otherwise the absurdity would be involved in the stipulation, that both parties had agreed to the insertion of a clause, and that an ordinary one, with a meaning attached to it, open and likely to produce at times a total loss of the vessel and cargo.

This shows also the proper signification and limitation belonging to the other provision — paying freight for the "*entire capacity*" of the vessel. That of course means, her entire capacity, without danger to her safety. This construction, in case of light goods, might fill her entirely, without such danger, and without making her too deep; whereas, in case of very compact and heavy goods, if filled entirely, she might be so deep as probably to sink in the first gale or strong swell.

We must start, then, with the construction of this charter which is reasonable and proper, holding that the owners could not reject any goods offered on account of their character, if not contraband or diseased, but were not obliged to take a greater quantity on board than the vessel, looking to her tonnage, shape and draught, could carry in safety. *Hunter* v. *Fry*, (2 Barn. & Ald. 421.) The place

and season where and when the voyage was to be performed, the ordinary depth of loading vessels of that size and character when employed in that business, are some elements to be considered in forming a correct judgment what a vessel can carry safely. They help to indicate what both parties probably meant, and certainly what they ought to have meant, in using such language. The usual forms of charter-parties in some places provide, likewise, expressly, that the vessel shall be required to receive no more than she can safely carry. See Appendix to Law of Chart. Part. (Woolwich on Com. Law, 98, 99.) But this, I think, is only what the law itself should imply as reasonable, when nothing is expressed on the subject.

On this construction of the charter, then, how are the facts? The vessel, it is conceded in all the evidence, was of about four hundred and eighty tons burthen; in shape, of kettle bottom; well built; about thirteen years old; marked on her rudder no higher than eighteen feet draught by the builder; and he, testifying that she was designed for no more than that draught when loaded. She was constructed with a view, more particularly, to the cotton trade, and when full of bales of cotton drew only about fifteen feet. Her character and capacity were open to be known to the respondents before hiring her, as she was built at East Boston or Medford; had been in business seven or eight years, and was lying in the port of Boston, where the respondents resided, when the charter-party was entered into. It did not appear from any evidence that she was out of repair, or had any secret defect, or was in any way incompetent to perform what any one had a right to expect from her size and shape, or what vessels of her tonnage and form can and do usually perform. There was no failure, then, in this respect, on the part of the plaintiffs, or their vessel, as has been argued by the respondents. Nor is it understood that the plaintiffs claim any exemption or excuse on that, or similar ground, from carrying all the merchandise, which it was proper to put on board of her.

Defects in the ship, which lead to taking in less merchandise than is usual, might sometimes defeat a recovery for freight. (Abbott on Shipping, 340–1; 3 Kent C. 205; 5 East, 428; 3 Mass. R. 481; 10 Johns. 1); *Silva* v. *Low*, (1 Johns. Cases, 134.) Nor is there any evidence here of fraudulent representations by the owners as to the capacity and power of the vessel, and which, if proved, might be fatal to this libel. *Johnson* v. *Miles*, (14 Wendell, 195.)

On these facts then, the quantity proper for her to take on board

was manifestly all she could hold, if it did not sink her below her usual and proper and safe depth in the water. But when her freight on board did sink her to that depth, then it was her right to refuse more. Then the point of safety and duty under the charter was reached, and then the plaintiffs could, if they pleased, halt and decline any increased risk from increased depth, and consequently increased exposure to danger in swells of the sea and gales.

It is optional with the owners of the vessel to go further or not, but no right exists in the charterers to require a risk and exposure beyond that.

It further appears, that on her voyage out, commencing in September, though some of the witnesses think her draught, loaded with ice, was, when starting, nineteen feet; others swear it did not exceed eighteen feet forward, and eighteen ten aft; and all agree, that by the use of water and provisions, and the melting of the ice, it was well known to be likely to become, and did become soon lighter, and by the end of the voyage she was nearly two feet less in draught.

The owners, on learning from the pilot, that her draught out at starting was considered by him nineteen feet, wrote at once to the captain, that if it had been so, it was too much, and he must not load back so as to draw over eighteen or eighteen and a half.

Sending their letter to England, and then to India, by overland mail, it reached Calcutta before the vessel, and the captain, immediately on his arrival at Calcutta, obtained it and informed the agents of the respondents accordingly as to the depth he would take in. It therefore became the duty of those agents to select and put on board a cargo which should draw no more, if that was the safe maximum draught of the vessel. They were bound to see to this, whether at such a depth the whole inside of the vessel should become full or not; and it was their business, if they wished to fill up the whole space, as they might with a larger proportion of light articles, without drawing over that depth, to send on board from time to time such an assortment as would accomplish this object. But they put on board first a large quantity of one of the heaviest articles in commerce, viz., three hundred and eighty-seven tons of saltpetre; then a large quantity of linseed, another heavy article, being three hundred and thirteen tons more; and while in the progress of doing this, they were cautioned by the captain, that the vessel would reach her proper depth before being full, if more light articles were not substituted. But nothing of this last character was put in, unless forty or fifty tons of goat

skins may be so considered. The blame, then, in not making a change, and in not filling the vessel before reaching a suitable depth, rests on the charterers and their agents, provided the vessel had reached that depth, when the captain refused to take more. (7 Car. & P. 41.) *Majer* v. *White*, (3 Cow. 9.) The captain neither bought the articles, nor sent them on board, but merely received and stowed such as came. By the charter he was to receive them at the vessel, and his duty begins with the receipt of them, and not before. (Abbott on Ship. 344; Molloy, B. 2, ch. 2, sec. 2.) He, therefore, executed his whole duty in this respect, in first notifying them expressly the depth to which the vessel might be safely loaded, and in afterwards informing them that such quantities of heavy articles as were coming on board would load her deep enough before filling.

If this mode of stowing or distributing the cargo, putting too much dead weight below was more dangerous, and made the vessel labor more, it arose from the course pursued by the agents in sending the articles on board, and bad stowage in this or other respects, about which there is some testimony, did not affect the real draught with the same articles, and thus have any influence on the question now under consideration. Bad stowage only affects responsibility for injuries or damage to the cargo caused by it. (Abbot on Ship. 345, and cases in note; Ware, 322, 188.) *The Reeside*, (2 Sumner, 567.) *Taunton Cop. Co.* v. *Merch. Ins. Co.* (22 Pick. 108.)

The only remaining question then is, whether the depth to which he allowed her to be loaded, viz. eighteen feet three inches, in salt water on an even keel or when trimmed, six inches deeper aft, as was her proper trim, eighteen and one half feet there, and eighteen forward, or, making a foot's difference, as some testified, nineteen feet aft at Calcutta, and eighteen forward, both less by three inches when in blue water, whether this depth was all which the charterers had a right to claim, and beyond which the owners had a right to refuse to go? The space left unfilled, it is agreed, was about one hundred and thirty tons measurement, and which the agents had prepared to fill with gunny bags, weighing from fifty to sixty tons, dead weight, and which would have increased the depth of the vessel four or five inches, and which the captain declined to receive.

The question is not, whether she might not have taken in more, and might not have escaped loss with it. Many vessels so escape with large chances against them. But the question is, whether the captain or owners were bound to take more, whether that was not the proper depth, under all the circumstances, to stop at, if they

pleased, and whether their contract or any general principles obliged them to risk any depth beyond that. Now on the side of the plaintiffs, to show that this was as much as her proper depth stands, not only the oath of her builder that she was designed to draw only eighteen feet, and of her officers in former voyages that she had not, on any occasion been loaded so deep as that, and the testimony of some that, when starting out in this voyage, she drew no more, and of all that she drew less soon, on her voyage, and that her owners, when hearing she drew more, wrote at once it was too much, and must be corrected in her return, but there is much other testimony, which remains to be specified.

Most of her officers in former years testify that this draught of eighteen and one half feet even keel was as much as should be considered safe. Several other experienced ship-masters agree with them in opinion. Several testify, that such a depth is sufficient for such a class of vessels. Three American vessels, then lying at Calcutta, and of course bound homeward with Calcutta cargoes, were actually loaded so as to draw little or no more depth than the Mattakeeset, compared with their different sizes. Thus, the Carthage, Capt. Archer, four hundred and twenty-six tons, had a draught of seventeen feet eight inches, when loaded. The Argo, Capt. Crowninshield, of four hundred and forty-nine tons, had a draught of eighteen feet three and one half inches. The Plymouth, Capt. Fuller, of four hundred and twenty-five tons, had a draught of seventeen feet six inches. And the Mattakeeset, Capt. Weston, four hundred and eighty tons, had a draught of eighteen feet six inches, even keel. This is very strong practical and cotemporaneous evidence of the depth being in this case near what was proper. Charles Pearsons, also, an inspector of ships, testified, that the Mattakeeset had been recorded in his books as a vessel of eighteen feet draught, with a common cargo.

The agents of the shippers, not agreeing in opinion with the captain and owners, that this depth was sufficient, and insisting on the right under the charter-party to fill the vessel full of lighter articles, and which would have increased her draught four or five inches more, the captain also called a survey by three American captains. This course had been recommended to him by the owners in case of any difficulty. Two of the captains examined the vessel and the loading, and reported and placed their opinion on the consular files there, open to the inspection of the agents and others, stating that the load on board deepened her as much as was safe, considering the state of the monsoons at that season in May, and the dangers of navigation generally after at sea, as well as for

eighty miles down the river against head winds. Their oaths since have been given to depositions, verifying this survey, as has that of the captain of the Mattakeeset, in support of his own views, concurring with them, and formed from his own experience in the vessel during her whole voyage out and back. He testifies also, that he sent to the agents a copy of the survey, the day it was made.

The pilot at Calcutta, whose deposition was taken by the respondents, but not being used by them, was read on the part of the plaintiffs, sustained in some respects the captain, and swore this vessel went to sea as deep as is usual there. And the third captain named in the survey but not attending, it is testified by two witnesses, informed them that the vessel was loaded deep enough. It was an admitted fact, too, that she actually had on board nearly double the weight of her measured tonnage, *e. g.* about 869 tons to a measurement of 480.

Opposed to this, and in favor of the safety and propriety of loading the vessel deeper, are the depositions of several sea-captains, residing in this neighborhood, who have seen the vessel, some before and some since her return. A portion of them think she would have worked better if filled up. Some think the monsoons, at that season did not much increase the danger. Some, judging from her height out of water and some from her draught, that more loading would not have rendered her unsafe.

The agents of the shippers in Calcutta testify to a like opinion, and that the captain of the Mattakeeset was not sufficiently communicative, and did not consult them as to any survey; and their evidence renders it probable he might have sent to them a copy of his protest, rather than of the survey. They further swore, that the pilot had informed them, vessels often went to sea drawing more than this one did. The third captain, named on the survey but not attending to it, testified, that the Mattakeeset might, in his opinion, have safely taken in more loading. So thought and testified also the inspector here, who had sworn to her being rated on his book at eighteen feet draught.

Now weighing this and the previous testimony, though quite in conflict, I feel constrained to come to the conclusion, that the balance is in favor of the plaintiffs, whether the burden of proof be considered on them or not. They have the weight of the builder himself of the vessel, who ought to know her design, and capacity, and dangers — the great weight of those who had actually sailed and navigated her for years — the oath of the captain then in her, — the oaths of two others, called in as advisers and *quasi* umpires

on this very subject at Calcutta — the opinion of the pilot himself, who took her to sea — and the corroborating views of several other experts.

All these united must preponderate over the general views of some other experts without any personal sailing in the vessel, or any examination of her at Calcutta, except the third captain — but only seeing her here before her voyage or after she had been lightened not only three inches by salt water, but eight inches by the consumption of her water and provisions on the voyage home.

The actual fact of this vessel never having been so loaded in former voyages for a series of years as to draw more; that when suspecting more had or would be put in by the charterers, the caution was at once given to them against it; the precaution under the difference of opinion to have a survey on the spot, which resulted in favor of the plaintiffs; the fact that the agents of the respondents attempted no new survey, though the other, if not formally reaching them from the captain on the 20th of April, was on the public files of the consul fourteen days before the sailing of the vessel on the 4th of May; the striking circumstance that the three other American vessels, then and there loading, did not in fact take in cargoes to draw more in proportion to their size, — are, when united, very decisive that this vessel carried as much as she was bound to do by her contract, when fairly construed.

The survey is not referred to as a conclusive measure, or one entitled to official weight, or indeed any beyond that of statements made by experienced and intelligent men on matters with which they are familiar, under attention specially turned to them at the time, and afterwards supported by their testimony duly taken. But, like other nautical usages, such as conferences with the crew as to steps to be pursued in sailing in a storm, or in throwing over goods for safety, (Abbot on Ship. 352, note,) it often indicates prudence and commendable caution.

It is no answer to this result, that other vessels from Calcutta sometimes go to sea drawing more, as the ships in the India trade are large, and from England, are frequently over double the size of the Mattakeeset, drawing as much or more water than some heavy frigates. But there is no proof, on the contrary it is disproved, that other vessels of a like size usually load there to a greater depth.

To avoid difficulty, the maximum depth to which a vessel may be loaded when so chartered, had better always be inserted in the contract, and the proviso, likewise that freight be paid *pro rata*, though a full cargo should not, by accident or other unblamable

cause, be delivered. Another source of controversies in these cases, and especially in the present, is the want of full, friendly, and frequent communications between captains and the agents. Such communications tend to prevent trouble from want of seasonable information, and foster a disposition on both sides to be accommodating and not punctilious as to going a little beyond, or falling a little short of what strict law may require. But it is proper to add here, that in this case no evidence or appearance exists of management, concealment or fraud on the part of the respondents or the captain, to avoid their contract or their duty. Their objections to loading with a deeper draught were made promptly, openly, and sustained in a fair and manly form by the survey called. This is commendable, and entitles them to a liberal construction of their conduct.

Again, a course, marked by due caution and care against dangers and losses, as was the captain's in this case, deserves approbation, when not carried to an extent indicating timidity or mere selfishness in behalf of himself or owners. One of our national failings may be deemed rashness, or daring and risking too much, and its calamities are often a warning to others not lightly to be disregarded, and at least not to be encouraged in cases of difficulty or doubt by courts of justice, in not upholding the side of safety, of prudence, and caution.

I think, therefore, that the full freight stipulated should be paid.

Superior Court, City of New York, October, 1847.

HARRIET C. OSBORN, Administratrix, *v.* FREDERICK MARQUAND.

An agreement by an attorney to claim nothing for professional services, if unsuccessful, is illegal.

THIS was an action, brought in the name of the administratrix, to recover the sum of $133 47, claimed as the fees of Osgood & Sherman, attorneys at law, for their professional services in prosecuting a note for $125, about seven years before, against a third party. It was proved, on the part of the defence, that Mr. Osgood offered to prosecute the note on his own account, and charge nothing, if unsuccessful, which was the case.

Coit and *Thomas*, for plaintiff.

Terry, for defendant.

The case was tried without a jury, and it was held by OAKLEY, C. J. that an attorney, in making such an agreement, acts illegally, and cannot come into court. Judgment for defendant.

Digest of American Cases.

[Selections from 10 Metcalf's (Mass.) Reports.]

ACTION.

An owner of land made an excavation therein, within a foot or two of a public street, and used no precaution against the danger of falling into it: A person passing in the night time went over the line of the street, fell into the excavation and was injured. *Held*, that the owner of the land was not liable to an action for the injury thus caused. *Howland* v. *Vincent*, 371.

ASSUMPSIT.

When goods are sold and delivered on a contract that the buyer shall pay therefor in town orders payable at a future day, and he fails to procure the orders, the seller cannot maintain indebitatus assumpsit for the goods, before the time when the orders were to be payable has expired: Before that time, his only remedy is by an action for breach of the special contract. *Hunneman* v. *Inhabitants of Grafton*, 454.

ATTACHMENT.

An attachment of property on mesne process is a lien or security on property, valid by the laws of this state, and is therefore within § 2 of the United States bankrupt act of 1841, which provides that such lien or security shall not be destroyed or impaired by anything in that act contained. *Davenport* v. *Tilton*, 320.

AWARD.

A. and B., by a written agreement, submitted to the determination of an arbitrator an action, pending in the superior court of Connecticut, brought by A. against B. for the conversion of a quantity of flour, with power in the arbitrator to decide said action according to law and evidence, and make an award within a certain time; which award A. and B. stipulated, in said agreement, to abide and perform: The arbitrator, within the prescribed time, made his award, namely, that B. was indebted to A. in the sum of $ 186, and that A. should recover said sum of B. in said action: A. carried the award to said court, and moved for judgment thereon, in said action: B. resisted this motion, and the court overruled it, on the ground that, by the law of Connecticut, a judgment could not be rendered, except by consent of parties, on an award under a submission not made by rule of court: A. thereupon became nonsuit, and brought an action against B. on the award. *Held*, that A. was entitled to recover. *Carpenter* v. *Edwards*, 200.

2. In an action on a promissory note given by the defendant for a sum awarded by three arbitrators, to be paid by him to the plaintiff, the defendant cannot defend by showing that one of the arbitrators, upon the statement of the chairman, who drew up the award, that it was right, signed it without reading it or knowing its contents, and that it was for a larger sum than was agreed upon by the arbitrators, unless he also shows that the said arbitrator was induced by some false representation, fraud or misconduct to sign a different award from that which he intended. *Withington* v. *Warren*, 431.

BANK.

Under the Rev. Sts. c. 36, § 31, which provide that "the holders of stock in any bank, at the time when its charter shall expire, shall be liable, in their individual capacities, for the payment

and redemption of all bills which may have been issued by said bank, and which shall remain unpaid, in proportion to the stock which they may respectively hold at the dissolution of the charter," it was *held* that the bill holders cannot severally maintain a bill in equity against the stockholders, to compel payment and redemption of the unpaid bills held by them respectively, but that all of them must join in one bill, or one or more of them must file a bill for the benefit of all, against all the stockholders. *Crease* v. *Babcock*, 525. *Grew* v. *Breed*, 575.

2. *Held also*, that a holder of bank bills, purchased by him as trustee, is entitled to maintain a bill in equity in his own name, without joining the *cestui que trust*, against the stockholders, for himself, and for all other holders of unpaid bills. *Grew* v. *Breed*, 569.

3. *Held also*, that one who buys bank bills of a broker, at a discount, under an agreement to keep them from circulation for a certain time, is entitled to the statute remedy against the stockholders, for the full amount of the bills, unless he has notice, when he buys them, that they are improperly issued by the officers of the bank; but that such a sale to him by a broker is not evidence of such notice. *Ib.*

4. *Held also*, that when part of the stock is owned by the bank itself, the individual stockholders are not, for that reason, liable to any further extent than they would have been if none of the stock had been so owned. *Crease* v. *Babcock*, 525.

BILL OF EXCHANGE.

An acceptor of a bill of exchange is not liable to the payee or indorsee for damages caused by non-payment, but only for the amount of the bill, with interest and costs of protest. *Bowen* v. *Stoddard*, 375.

2. The statute of Maine, which enacts that, in an action on a bill of exchange drawn or indorsed in that state, payable in this state, and protested for non-payment, the holder shall recover three per cent. damages, in addition to the contents of the bill and interest, does not entitle the holder to recover those damages in a suit brought against the acceptor in the courts of this state. *Fiske* v. *Foster*, 597.

CONVICTION.

A conviction before a justice of the peace is well sustained by a record which shows that the defendant, on being asked whether he was guilty or not of the offence alleged against him, fraudulently and wilfully stood mute, and that, after due examination of witnesses and a full hearing of the case, he was adjudged to be guilty, and was sentenced to imprisonment. *Ellenwood* v. *Commonwealth*, 222.

COVENANT.

When a grantor of land covenants with the grantee that the granted premises are free from all incumbrances, except a mortgage which he engages to discharge, and also covenants to warrant and defend the premises against the lawful claims and demands of all persons, he is liable on the covenant of warranty, if, by his omission to discharge the mortgage, the grantee or his assignee is obliged to discharge it in order to remove the incumbrance. *Bemis* v. *Smith*, 194.

DEED.

A., in 1789, made a deed conveying land to B., on condition that B. and his heirs should permit C. and his heirs to possess and enjoy said land during the life of A., and on the further condition that B., his heirs and assigns, should not divert the water from a spring on the land conveyed, so as to injure the land of C., but should suffer the water to pass off in its natural course; and that B. should also, if C. or his heirs should so incline, have the right to enter on said land, and convey the water, in logs, for the use of C.'s house and barn: C. and his assigns, the last of whom was G., enjoyed the right, for thirty-five years or more, of carrying the water from the spring in logs, agreeably to said deed: In 1840, the land so conveyed to B. by A. was conveyed to D., "subject to G.'s right to convey water from the spring across said land:" D. afterwards obstructed the flow of the water, in logs, to G.'s house and barn, and G. brought an action against him to recover damages for the obstruction. *Held*, that by the true construction of A.'s deed to B., in connection with the long use of the water by C. and his assigns, A. intended to give a right to C. to enter upon the land, after A.'s

decease, and to conduct the water, in logs, for the use of his house and barn. *Held also*, that D. was precluded, by the deed made to him in 1840, from questioning G.'s right so to convey the water from the spring; and that G. was entitled to maintain his action. *Goddard* v. *Dakin*, 94.

2. A grantor made a deed of bargain and sale of land, describing it by metes and bounds, and as bounded on one side by a street, and also as being "the same that was set off to W.:" The land set off to W. did not extend to the street, and the grantor was not seized of any land besides that which had been so set off. *Held*, that the land which the deed purported to convey was truly described by the metes and bounds referred to, and that this description was not controlled by the subsequent reference to the land set off to W. *Dana* v. *Middlesex Bank*, 250.

3. A town voted that certain land, claimed by the town, be sold at auction to the highest bidder, and that a committee of three be authorized to sell it, and to give a warranty deed thereof to the purchaser: One of the committee, who was not a licensed auctioneer, sold the land at auction to A., who was the highest bidder: A. refused to take a deed of the land, but consented that B. might take the land at A.'s bid; and the committee thereupon made a deed of the land to B., in behalf of the town. *Held*, that the illegal act of the auctioneer, in selling the land without being licensed, did not affect the conveyance to a purchaser who did not know that the auctioneer was not licensed; that the sale was substantially in pursuance of the vote of the town; and that the deed to B. was a valid conveyance of the title of the town. *Williston* v. *Morse*, 17.

4. Land was described, in different deeds, as bounding "on the mountain," and "by the mountain," and "the foot of the mountain." *Held*, in the particular case, that these words were too indefinite and uncertain to control the courses, distances, and other references in the deeds, descriptive of the land. *Held also*, that it was a question depending both on law and fact, whether these words excluded or included a certain part of the mountain, and that this question should have been submitted to a jury, under such directions from the court, as to the rules of construction, as were applicable to the case. *Held also*, that it might be important, in order to decide this question, to ascertain the location of adjoining lots of land. *Ib.*

ESTOPPEL.

A feme sole claimed certain land by virtue of a location thereof, made to her by the proprietors; and after her intermarriage with A., he entered upon the land, under the location, and continued in possession thereof, after her decease, as tenant by the curtesy: Her heirs conveyed their reversionary interest to B., who sued A. in an action of waste. *Held*, that A. could not defeat the action by showing that the location of the land was so defective that it would not bar the proprietors, nor persons claiming under them; but that he was estopped to deny the title under which he entered. *Morgan* v. *Larned*, 50.

EVIDENCE.

An indictment, which alleges that the defendant had in his possession a coin, counterfeited in the similitude of the good and legal silver coins of this commonwealth called a dollar, with intent to pass the same as true, knowing it to be counterfeit, is supported by proof that the defendant had in his possession a coin, counterfeited in the similitude of a Mexican dollar, with such intent and knowledge. *Commonwealth* v. *Stearns*, 256.

2. And for the purpose of proving such knowledge, evidence is admissible that the defendant previously passed similar counterfeit coins, although an indictment is pending against him for such passing. *Ib.*

3. In a suit against an attorney for neglecting to defend an action, his declarations, made to the court when the action was called on for trial, that he had no defence to make, because his client, though requested to instruct him in a defence, had not done so, were admitted in evidence, and the jury was thereupon told by the judge that these declarations were not evidence of the truth of the facts stated, but were admitted to show the circumstances which occurred at the time of the alleged negligence. *Held*, that the declarations were properly admitted, subject to the limita-

tion stated by the judge. *Salisbury* v. *Gourgas*, 442.

4. A wife who keeps her husband's accounts is a competent witness for him, in a suit in which he introduces his book of original entries, to testify that she made the entries, by his direction and in his presence: And after she has so testified, he may be permitted to testify as to the times when the entries were made, and that the charges contained in them are just and true. *Littlefield* v. *Rice*, 287.

EXECUTOR AND ADMINISTRATOR.

An administrator, who recovers judgment as such, and levies execution on land, holds the legal estate in the land, to the use of the heirs of his intestate; and if he sells and conveys the same, without having obtained license so to do, the conveyance can be avoided only by those for whose use he was seized thereof; and if they receive the money for which it was sold, they thereby confirm the sale. *Thomas* v. *Le Baron*, 403.

INFANT.

In an action by the promisee against the maker of a note who sets up infancy as a defence, the plaintiff, after proving that the note was given to balance an account standing on his books against the defendant, may show from his day book and ledger, though they do not contain his original entries, the several articles of which the account was composed: Such evidence is competent for the purpose of showing an admission of the defendant that he received the articles, but not for the purpose of showing that the articles were necessaries, or that they were charged at fair prices. *Earle* v. *Reed*, 387.

INSURANCE.

An application for insurance against loss of a meeting-house and its fixtures by fire was made to a mutual fire insurance company that could not, by statute and its own by-laws, insure upon any building an amount exceeding three-fourths of the value thereof; and in the application the value of the building was stated to be $4000: The company executed a policy, insuring, under the conditions and limitations expressed in its own by-laws and in the statute regulating mutual fire insurance companies, $3500 on the meeting-house and fixtures; The house was destroyed by fire, and the company paid $3000 to the assured, towards the loss. In a suit on the policy to recover the balance of $500, it was *held*, that the assured could not recover; that the statement of the value of the house and fixtures, in the application for insurance, was conclusive on the assured, so that they could not be permitted to show that the property insured, at the time of the insurance, was of such value that $3500 did not exceed three-fourths thereof. *Holmes* v. *Charlestown Mutual Fire Ins. Co.* 211.

JURY.

It is the duty of the court to give instructions to the jury on all questions of law which arise in a cause tried by them, and it is the duty of the jury to receive the law from the court, and to conform their judgment and decision to such instructions, in applying the law to the facts to be found by them. To this duty jurors are bound by a strong social and moral obligation, enforced by the sanction of an oath, to the same extent and in the same manner as they are conscientiously bound to decide all questions of fact according to the evidence. *Commonwealth* v. *Porter*, 263. *Commonwealth* v. *White*, 14.

2. But in a criminal case, a defendant has a right, in Massachusetts, by himself or his counsel, to address the jury, under the general superintendence of the court, upon such questions of law as come within the issue to be tried. *Commonwealth* v. *Porter*, 263.

MORTGAGE.

Of Real Estate.

A. and B., in 1827, mortgaged land to C. and D. jointly, to secure one note made by A. and B. to C., and two notes made by them to C., which were signed by D. as their surety: D. paid these two notes, and afterwards, viz. in 1834, C. and D. brought an action on the mortgage, and recovered judgment for possession of the mortgaged premises, unless A. and B. should pay the amount due on the other note: Execution issued on said judgment, but was never put into the hands of an officer, and C. never took possession of said premises: In 1840, D. recovered a judgment and took out execution thereon

against A. and B., caused their right to redeem said premises to be sold on said execution, became the purchaser of said right, received a deed thereof from the officer who sold it, entered upon said premises, and had exclusive possession thereof more than three years: C.'s administrators afterwards brought a writ of entry against A., B and D., to foreclose the mortgage. *Held*, that C. and D. were tenants in common of the legal estate; that there had been no ouster by D., and therefore that this action could not be maintained. *Held also*, that the interests of the parties in the equitable and beneficial estate might be adjusted by a bill in equity. *Root* v. *Bancroft*, 44.

2. When a mortgagee of land, whose title thereto is paramount to that of a lessor thereof, takes possession of the land by virtue of an execution issued on a judgment recovered by him in a writ of entry, and leaves the lessee in the occupation of the land, he is entitled to recover of the lessee the rent subsequently accruing, but not the rent which had previously accrued. *Massachusetts Hospital Life Ins. Co.* v. *Wilson*, 126.

Of Personal Property.

3. A mortgage of goods which the mortgagor does not own when the mortgage is made, though he afterwards acquires them, is void as against his attaching creditors. *Jones* v. *Richardson*, 481.

4. On the question of the validity of a mortgage of goods which the mortgagor did not own until after the mortgage was made, evidence that the mortgagee took possession of the goods for the purpose of foreclosing the mortgage, is irrelevant and inadmissible. *Ib.*

5. If a mortgagor of chattels makes a new and distinct contract with the mortgagee to deliver to him the mortgaged chattels, and also other chattels to be held as security for payment of the debt which the mortgage was made to secure, and delivers them accordingly, and the mortgagee takes and holds possession of them under such new contract, he thereby becomes pawnee of all the chattels so delivered. *Rowley* v. *Rice*, 7.

PRINCIPAL AND AGENT.

An agent employed in the manufacture of carriages has no authority, by implication from the nature of that business, to bind his principal by a negotiable note given for labor or materials. *Paige* v. *Stone*, 160.

2. In a suit against two principals on a negotiable note, of which they had no knowledge before action brought, given in their names by their agent, who had no express authority, nor any authority by necessary implication from the nature of his business, to give such note, it was *held*, that evidence of the agent's having given two similar notes, to the first of which one only of the principals afterwards assented, and the last of which, for a small sum, the principals directed to be settled after they were sued upon it, was not sufficient to prove the authority of the agent to bind them by the third note. *Ib.*

3. When a party, dealing with an agent, takes his promissory note, with a knowledge of his agency, and of the liability of the principal for the debt for which the note is given, he thereby discharges the principal; and the contract cannot be afterwards rescinded, and a new one made, by which the principal will be bound, without his knowledge and assent. *Ib.*

4. The relation between the master of a vessel and his owners is not such that they thereby become liable as acceptors of a bill of exchange drawn on them by him in a foreign port, for supplies furnished to the vessel. *Bowen* v. *Stoddard*, 375.

5. A usage among the owners of vessels at particular ports to pay bills, drawn by masters for supplies furnished to their vessels in foreign ports, cannot bind them as acceptors of such bills. *Ib.*

PROMISSORY NOTE.

A. made seven promissory notes, of the same date, payable to B. or order, at different times, and gave B. two mortgages of personal property, to secure payment of the notes as they should become due: The first two notes were paid by A. at maturity: B. and C. indorsed one of the other notes to a bank that discounted it, and B. indorsed another of the notes to C.: B. also assigned said mortgages to the bank, to secure payment of the discounted note: The bank foreclosed said mortgages, and C., with the consent of B., placed the note, which B. had

indorsed to him, in the hands of the cashier of the bank, as agent of C., to do with it as he should think for C.'s best interest, and to secure it, if he could, out of the mortgaged property in the cashier's hands, which was of greater value than the amount of the five notes which A. had not paid: The cashier commenced an action for C., against A., on the note indorsed by B. to C., and caused A.'s property to be attached to secure it. *Held*, that the foreclosure of the mortgages by the bank did not operate as payment of the note held by C., and that A. was liable to said action. *Leland* v. *Loring*, 122.

RAILROAD CORPORATION.

Proprietors of a railroad, who transport goods over their road, and deposit them in their warehouse without charge, until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for the loss of the goods from the warehouse, but are liable, as depositaries, only for want of ordinary care. *Thomas* v. *Boston and Providence Railroad Corporation*, 472.

SHIPS AND SHIPPING.

When the owners of a vessel have let her on shares, for a certain time, to the master, who is to victual and man her, they cannot maintain an action for freight earned by the vessel during that time: Such action can be maintained by the master only. *Manter* v. *Holmes*, 402.

TROVER.

Upon the trial of the question, whether an assignee of an insolvent debtor could maintain trover, without proof of demand and refusal, against a vendee of goods sold by such debtor before he came under the operation of the insolvent laws, the court instructed the jury, that it was necessary, in order to support the action, that it should be proved, to their satisfaction, that the sale of the goods was fraudulent; that both the vendee and vendor concurred and united in the fraud; and that it was further necessary that it should be proved that the vendee converted the goods to his own use; and that demand and refusal constituted one mode, but not the only mode, of proving such conversion. *Held*, after a verdict finding that the action of trover was well maintained, that the instructions to the jury were correct. *Salisbury* v. *Gourgas*, 442.

VERDICT.

The court of common pleas has a right to set aside a verdict of a sheriff's jury, assessing damages sustained by a party by the laying out of a road over his land, for the reason that the damages are excessive, as well as for any other good reason. *Harding* v. *Inhabitants of Medway*, 465.

WILL.

A will, written by the testator's hand and signed by him, had, at the end thereof, the usual words, "signed, sealed, published and declared by the abovenamed E. to be his last will," &c., and the names of three attesting witnesses under those words. The first and third attesting witnesses testified that they subscribed their names thereto, at different times, at the testator's request and in his presence, and that he declared to each of them that the paper was his last will: The first witness testified, also, that he saw the testator's signature to the paper: The second attesting witness testified that the testator asked him to sign the paper, and pointed out to him the place where he wished him to put his name, viz. under the aforesaid words, "signed, sealed," &c., and that he signed his name there, in the testator's presence, but that he did not know what the paper was, and did not notice the signature of the testator, nor of the previous attesting witness, though he surmised that it was the testator's will. *Held*, that upon this testimony, and such inferences as a jury might make from it, a verdict, finding that the will was duly executed, should be sustained. *Hogan* v. *Grosvenor*, 54.

2. A testator devised one half of certain real estate to his "son John and the heirs lawfully begotten of his body, and their heirs and assigns." *Held*, that the first words gave an estate tail to John, and that the words "their heirs and assigns," did not enlarge the devise to a fee simple, either to him or the heirs of his body. *Buxton* v. *Inhabitants of Uxbridge*, 87.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT. VOL. XVIII. New Series. By PETER T. WASHBURN, counsellor at law. Vol. III. Woodstock: Haskell & Palmer, 1847.

The expense of procuring a final decision of a point of law in Vermont must, to judge from the cases reported, be very trifling. For in many of the cases the whole amount in controversy is much less than the bill of costs for a single law term of the supreme judicial court of this county (Suffolk.) But the cases present law points of quite as much intricacy and importance (except so far as mercantile and marine law is concerned) as arise in our courts, and they are uniformly decided with much learning and ability. We have space for notice of only a few of them. In *Smith* v. *Nelson*, p. 511, there is a decision refusing to take cognizance of merely ecclesiastical disputes, which it is refreshing to read, after a perusal of the New York decisions on the same subject. In *Keyes* v. *Water*, p. 479, there seems to be a mistake in the assertion of the marginal note, that the writing was "directed to a *third person*." The case finds that the direction was to "William Keyes," who was the maker of the note and the plaintiff in the action. In *Sawyer* v. *Meth. Ed. Society in Royalton*, p. 405, the court held that a committee to build a church had authority to contract with one of its members to do the work, which we think an untenable position. In *Whitney* v. *Clarendon*, p. 252, the chief justice dissents, but we think the argument is with the majority.

THE ARGUMENT LIST OF THE LAW ACADEMY OF PHILADELPHIA SESSIONS of 1847-8: Philadelphia. Printed for the Law Academy only.

This is a neatly printed pamphlet of sixty-four pages, containing moot court cases intended for forensic disputation by the members of the academy. This Law Academy, we understand, is an institution of many years standing in Philadelphia, and has numbered among its members some of the profession who are now actively engaged in responsible and lucrative practice. It is designed as a school of legal argument for the younger members of the bar and law students, to whom the cases are assigned, four counsel being named in each case, in a similar manner to that pursued at the Dane Law School. It cannot fail to be of signal benefit to those who diligently prepare their cases and fully investigate the authorities. The institution seems to be in a vigorous condition, and quite popular, as there are some eighty names upon the list of active members. We notice that the Hon. Thomas Sergeant, who was for several years a judge of the supreme court of the state, is the provost; and John Cadwalader, Peter McCall, Benjamin Gerhard, Isaac Hazlehurst, William A. Stokes, and George M. Wharton, Esquires, are the vice-provosts, to whom appears to be assigned the active duties of sitting as judges upon questions of law. All these gentlemen are in active practice, and eminently qualified for the posts they occupy. We may also mention that we notice among the *acting members* and junior officers, the names of G. W. Wallaston, Esq., as president, and the name of A. I. Fish, Esq., as prothonotary, both of whom are graduates of the Dane Law School at Cambridge.

The present pamphlet contains thirty-four cases, upon various points of law, all of which are of the most practical nature, and are most carefully and accurately stated. We congratulate our young friends in Philadelphia upon the opportunity which is thus afforded them, of securing a preliminary training, under the patronage of some of the most distinguished members of their bar. This example might be followed with advantage in the other large cities of the Union.

Intelligence and Miscellany.

COSTS IN THE ADMIRALTY. — The following communication is cheerfully published. It may furnish a subject for some remarks in our next number.

To the Editor of the Law Reporter.

Sir, — The leading article in the number of the Law Reporter for this month, on Costs in Admiralty, is calculated to circulate most erroneous impressions on the subject, in so far as it attempts to characterize proceedings in the New York district.

It must be a cardinal object with your useful publication to give correct intelligence in respect to the existing state of the law, and its administration in the United States; and I therefore venture to furnish you a correction of the errors, in relation to this district, embraced in the article.

I have no doubt it very correctly states that the judge of the Massachusetts district has carefully and solicitously carried out the act of congress of July, 1790; and that he is entitled to the commendation bestowed, for encouraging the process to show cause in suits for seamen's wages, before the process *in rem* is used; but it seems to me the writer should be sure of his grounds, before asserting "that in New York, and other maritime cities, the practice is to proceed *in rem* at once, with full sail, and all colors flying. The first notice the owner gets, is, that his vessel is libelled; and be the demand ever so small, he cannot settle it without the most extravagant costs," &c.

It is remarkable, that with the means of accurate information so accessible, if indeed the practice in the New York district is not equally well known in Boston as here, statements should have been put forth in a studied article, so destitute of the slightest foundation to support them.

The standing rules of admiralty practice, in this district, have been carefully digested, and published, many years since; and the course of proceedings in no other district, is more distinctly prescribed, nor, as is believed, has been more generally consulted, and familiar to the profession.

The judge of this district, in 1838, published a summary of the practice in admiralty, of the courts here, to which the rules were annexed. The publication was commended in court, in Boston, before the bar, by Judge Story, as appears by the Law Reporter of that period. It is singular that, in preparing a statement of the course of the New York courts, the writer of the article should not have recurred to authentic sources of information, so readily at command.

The work describes most particularly the proceedings by summons, in suits for seamen's wages. (Betts's Pr. § 11, p. 59.)

It is there shown that the act of 1790 is most scrupulously observed. Every step is directed in accordance with this act. Not only so, but to induce owners to satisfy the wages, on their first demand, the vexation of costs, which might provoke litigation, is taken away, and he is placed in a situation to settle with the seamen, in most instances, on the payment of their wages only; and when costs are imposed they are so trivial in amount as to afford no just ground of complaint. (Betts's Pr. 65, 67.)

Whilst the preliminary proceedings

were before the judge, they were exempt, almost entirely, from costs. The amount charged, including witnesses' fees, never exceeded two dollars, and in most instances no costs whatever were imposed on either party.

Since 1841, however, the judge has been unable to give time for preliminary hearings, and they are brought before him only on appeal.

Commissioners, appointed by the circuit court, are authorized, by the act of 1842, to perform these duties; and as they receive the same fees as state officers, for like services, proceedings by summons are attended with some costs to the owners of vessels, in case the decision is against them, and it is found they unjustifiably withhold the wages due.

I have obtained a copy of charges made by the commissioners in these cases, when the wages are settled at the hearing, and I place them beside those stated in the Law Reporter as the Massachusetts tariff, that the profession and the public may judge how justly the latter are pronounced "less unreasonable than in New York."

Fees of officers of court, in New York, on summons for wages:

Commissioner granting summons,	$1.00
Swearing witness to demand,	12½
Summons, drawn and engrossed by the commissioner,	75
Do. for witnesses,	37½
Taking affidavit of service of summons on ship, &c.	12½
Swearing one witness,	12½
Commissioner on hearing,	1.00
Order and certificate of probable cause, granted,	1.12½
One witness, (if not a party, named in the summons,)	1.25
	$5.87½

No costs are taxed in these proceedings, to the clerk, marshal, or proctor, in the New York district.

Massachusetts charges for same services. (10 Law Reporter, 247.)

Clerk for summons,	$2.00
Entry,	5.00
Subpœna,	50
Witness attending,	1.25
Swearing witness,	10
Summons,	3.05
Marshal for serving writ,	2.00
Proctor's fees,	17.00

To this, it appears, are to be added,

Commission (for commissioner,) for order of notice to defendant,	50
" subpœna to witness,	50
Marshal for serving notice,	3.05
" " subpœna,	2.05
	$37.00

Besides, probably, commissioner's fees for his services, when the proceedings are before him, and not before the judge.

This is the extent of costs proper to the hearing on summons in New York, when only one witness is examined, however the case may be contested. But the parties may require the examination to be taken in writing, for the purpose of appeal to the judge, if process *in rem* is awarded or denied, and also to be used on the hearing, in case of contestation on the merits, before the court. The commissioner is then entitled to charge twenty-five cents per hundred words, for taking the testimony in writing.

If the parties wish to appeal to the judge, it may be done *instanter*, on the proofs taken by the commissioner. No costs whatever are taxed on this proceeding, to the clerk or proctor.

These facts show the entire inaccuracy of the comparisons made by the Law Reporter; and also that the disparaging references to the New York practice, are without the slightest foundation.

It is not the purpose of this communication to enter at large into the particulars of the New York practice, or to compare or contrast it with that of any other state, further than necessary to rectify the impression given by the Law Reporter, that, in the collection of small demands, ship owners are exposed to "most extravagant costs" here, which they are protected against elsewhere.

And, in this connection, it may be fit to refer to the provision, peculiar to New York, rendering proceedings for collecting in admiralty, demands not exceeding $50, *summary*, and chargeable with very limited costs. (Betts's Pr. § 14, p. 78; Rules, 165–179.)

The proctor cannot recover over $12: the fees of the clerk and marshal are also so limited, that, if no defence be interposed, a vessel may be attached,

and all the steps necessary to her condemnation and sale, be taken, and the proceeds be collected and paid over, in an amount of costs less than stated in the Law Reporter, to be charged in Massachusetts, on the preliminary hearing by summons.

Undoubtedly, if the litigation is protracted, and especially in plenary actions, by the augmentation of custody expenses, and the multiplication of proceedings on the one side and the other, a suit in admiralty is attended with heavy costs; yet in no way equal to those in contested suits in chancery, except in the particular of custody fees: and I am not aware of any continuance in any system of jurisprudence, by which a remedy *in rem* can be had, and the rights of claimants to *the thing* be preserved, without considerable expense.

I think these facts demonstrate that proceedings on summons, for the recovery of wages, is the invariable course in the New York district, in cases coming within the act of 1790, and instead of costs being *exorbitant and oppressive*, those cases are eminent instances of cheap justice.

It is believed that cases of like intricacy and importance, or even common collection suits, are not disposed of in the lowest magistrates' courts, at smaller expense to parties.

The act of 1790 likewise provides for attaching vessels in the first instance, without a preliminary summons or notice. The New York practice, then, protects owners against irregular and groundless attachments, and exorbitant bail. A mandate may be obtained from the judge for the libellant, to show cause *instanter*, before him, why the arrest should not be discharged, or the bail stipulation be mitigated. (Betts's Pr. 45, 46.) So, also, instead of bonding the vessel in double her value, as is the usual course in admiralty courts, the New York practice permits the owner to deposit in court the amount of wages sworn to be due, together with interest, &c., and $250 to cover and abide the costs and event of the suit below, or on appeal. (Betts's Pr. 45, Rule 65.) In this way the owner is relieved from the necessity of finding sureties, perhaps in a strange port, and can, by a small deposit, to be restored him on defeat of the action, instantly release his vessel, and employ her as if his suit *in rem* was pending.

It would be gratifying to see pointed out a method by which this invaluable right of seamen to hold the vessel for their wages, can be secured, and the interests of ship owners be preserved, with less costs than are chargeable in New York, on proceedings by summons.

The Law Reporter shows most conclusively, that the act of last session utterly fails fulfilling these *two* objects. It was probably obtained with a view to one only of them: and whether, as suggested by the Reporter, it was passed under the influence of the *New York Herald*, or at the instance of some lobby agent of irritated ship masters and owners, it is manifestly a measure which directly prejudices seamen, and will not be likely to save litigation, or costs to ship owners themselves.

With that law, however, I have no concern: my purpose is solely to place on the face of the Law Reporter correct information in respect to a highly important branch of legal proceedings.

New York, October 14, 1847.

French Criminal Cases. — The number of the Law Reporter, for May, 1846, contained some reports illustrative of the judicial practice of the French courts, and reference was there made to the important and almost exclusive action of the presiding magistrate. In a very exciting case, which has recently occurred, the case of the *Duc de Praslin*, the examination of the accused and of the witnesses was conducted in the same manner. The severity of the examination, and the efforts which were made to extort admissions from the prisoner have aroused the indignation of the press, both in England and this country. This strong expression of feeling may be referable to the notoriety of the case, but the evil complained of strikes all lovers of the common law procedure so unpleasantly, that we cannot forbear making a few references to the manner in which the examination was conducted.

The duke was accused of a murder, committed on the morning of the 18th of August, and, a variety of circumstances concurring to prove his guilt, he was put under a close *surveillance*

on the evening of the 18th, and on the 19th and following days, he was subjected to a very severe examination. During this examination, as was afterwards discovered, he was suffering from the effects of poison, for, instead of the energetic, hasty, and irascible character for which he had previously been remarkable, a total dejection of physical and mental strength was apparent. His answers to the interrogatories were vague and incoherent, and implied no satisfactory account of any suspicious circumstance. Yet, while he hardly had possession of his reason, he was subjected to a peculiar course of judicial torture. Although his life depended upon every word he uttered, he was not only compelled to answer, but the greatest ingenuity was displayed in propounding embarrassing and deceptive questions. Nor was the magistrate contented with a denial of any facts alleged, but pressed the same point in various ways, hoping to obtain some admission, or, at least, some signs of inconsistency. We make the following extracts:

Pres. You know the horrible crime imputed to you; you know all the circumstances which have been laid down before you, and which exclude the very appearance of a doubt. I recommend you to abridge the fatigue you appear laboring under by confession of the truth, for you cannot, you dare not deny it! *Acc.* The question is very precise, but I have not strength to answer. It would require very long explanations.

Pres. You say it would require very long explanations to answer the question I have just put to you; not so, a "yes" or a "no" is sufficient! *Acc.* It requires great moral strength to answer yes or no, — an immense strength, which I have not.

Pres. No long explanations can be requisite to answer the question I have just asked you? *Acc.* I repeat, it would require a moral strength, which I do not possess, to answer it.

Pres. At what hour did you leave your children the evening before the crime? *Acc.* At half past ten or thereabouts; a quarter to eleven, perhaps.

Pres. What did you do after you left them? *Acc.* I went down to my chamber, and got into bed immediately.

Pres. Did you sleep? *Acc.* Yes.

Pres. Till what hour? I do not recollect.

Pres. Was your resolution fixed when you went to bed? *Acc.* No; I cannot even tell whether that might be called a resolution.

Pres. When you awoke, what was your first thought? *Acc.* I believe I was awakened by cries in the house, and that I hurried to the chamber of Madame de Praslin. I would ask you to restore me to life by interrupting this interrogatory.

Pres. When you entered the chamber of Madame de Praslin you could not be ignorant that all the issues around you were shut — that you alone could enter! *Acc.* I was ignorant of that.

Pres. You entered the chamber of Madame de Praslin several times that morning; was she in bed the first time you went there? *Acc.* No; she was unfortunately stretched on the floor.

Pres. Was she not lying on the spot where you would appear to have struck her the last time? *Acc.* How can you put such a question to me?

Pres. Because you did not answer me at first. How did you come by the scratches I see on your hands? *Acc.* I got them the evening before leaving Praslin, as I was packing up my things with Madame de Praslin.

Pres. How did you come by that bite I see on your thumb? *Acc.* It is not a bite.

Pres. The surgeons who have visited you have declared it is a bite! *Acc.* Spare me, my weakness is extreme.

Pres. You must have passed a very painful moment when on entering your chamber you perceived yourself covered with the blood you had shed, and which you tried to wash out? *Acc.* That blood has been erroneously explained; I did not wish to appear before my children with the blood of their mother.

Pres. Do you not feel very unhappy at having committed this crime? (The accused was silent, and appeared lost in thought.)

Pres. Were you not under the influence of bad advice, impelling you to commit this crime? *Acc.* I have received no advice; no one would advise such an act.

Pres. Are you not tortured by remorse; and would it not have been a sort of relief to you to have said the

truth? *Acc.* My strength fails me entirely to-day.

Pres. You do nothing but speak of your weakness. I asked you a short time ago to answer me only by "yes" or "no?" *Acc.* If any person would feel my pulse, he would easily judge of my weakness.

Pres. You have just had strength enough to answer a good many questions of detail which I had addressed to you; your strength did not fail you for that. (The accused was silent.)

Pres. Your silence answers for you that you are guilty? *Acc.* You are come here with the conviction that I am guilty; I cannot change it.

Pres. You could change it if you gave us reasons to the contrary, if you were to explain differently what appears only susceptible of explanation by your guilt? *Acc.* I do not think I can change that conviction in your mind.

Pres. Why do you not believe it possible to change our conviction? (The accused, after pause, declared it beyond his power to continue.)

Pres. When you committed this horrible act did you think of your children? *Acc.* As to the crime, I did not commit it — as to my children, they are the constant subject of my thoughts.

Pres. Dare you affirm that you have not committed this crime? (The accused rested his head upon his hands and remained silent for a few instants; then he said, "I cannot answer such a question.")

M. de Praslin, you are under mental torture, and as I told you just now, you might perhaps assuage it by answering me. (The accused did not answer, and begged as a favor that his interrogatory might be interrupted and put off to another day. In compliance with this request the interrogatory was stopped.)

The record of such a proceeding can, of course, only interest us as a matter of curious intelligence. Yet few will fail to appreciate the security of individual rights under our own system, in contemplation of so gross a mockery of justice as was displayed in the course of this investigation.

IMPORTANT MOVEMENT IN NEW YORK. — It is well known that commissioners were appointed in New York, some time since, under the new constitution, and a subsequent statute, to consider the subject of legal practice and pleadings. The commissioners have thus far, made only a preliminary report, in accordance with a resolution of the house of assembly, requiring them to report "progress, if any, made in the discharge of their duty, and at what time they will probably be able to report the result of their doings, for the consideration of the legislature." Although this report appears to have been prematurely made, it explains the general intentions of the commissioners. They have determined to take bold ground, and recommend the adoption of a new system, (to be submitted hereafter in detail) which shall not only abrogate the unnecessary features of the present remedial law, but shall preserve and embody "all that the experience of the past has shown to be valuable and conducive to the prompt, vigorous and cheap administration of justice." The commissioners seem to appreciate the danger of such a sudden and general change; but that they have determined to avoid any attempt to engraft new improvements upon an old system appears from the following:

"But we find — to our minds at least — a sufficient answer to this proposition, in the failure which has hitherto attended such attempts, not only in our own state, but in every state in the Union in which that system prevails, and in England, from which it has been borrowed. From the earliest ages of the law, efforts of this kind have been made by legislative interference, and by an occasional determined disposition on the part of the courts to relax a portion of the rigor of the existing system, and to make it bend to the great object for which it was designed. And yet the experience and observation of the candid among the legal profession will bear us out in the assertion, that the result has been to render what in its inception was designed to be, and what in its practical working should be, merely the means of enforcing right and redressing wrong, an astute and subtle science — technical and refined apparently for its own sake — and, it is not too much to say, in no small degree subversive rather than promotive of the end of its institution."

The commissioners announce that the following subjects will be acted

upon, in presenting recommendations to the legislature:

1. A revision and condensation of the laws regulating the organization of the courts:
2. Civil actions, and their incidents:
3. Proceedings and pleadings in civil actions:
4. Costs.
5. Appeals.
6. Summary and special proceedings created and regulated by statute:
7. Proceedings in surrogate's courts:
8. Practice and pleadings in criminal cases.

They then declare that they have decided upon several cardinal principles by which they intend to be governed. These are:

1. The establishment of a uniform course of proceeding, (including both practice and pleading,) in all cases, whether of legal or equitable cognizance.

2. The abrogation of the existing distinctions between forms of actions at law, so that no action to be commenced hereafter, need be designated by any special name, but its only test shall be a right, in the party complaining, to a remedy corresponding to his case, or a violation or withholding of such right by the party complained against.

3. The establishment of a new system of pleading, by which the present fictions, technicalities and verbiage shall be swept away.

This is an outline of the great task, which the commissioners have imposed upon themselves. They did not arrive at this result with unanimity. Mr. Hill could not agree with his colleagues, in the expediency or propriety of entirely abolishing the present system, but thought that amendments might be safely introduced. In consequence of this difference, he left the commission, and D. D. Field, Esq. has been selected in his stead. Nevertheless, the commissioners seem to have fully appreciated each other's services, and not to have divided until the matter had been fully considered, and the total difference of opinion upon the cardinal principles of the new system had been clearly established.

We abstain from any criticisms, intending, when the duties of the commission have been completed, to review their system at length.

Legislation for Insane Prisoners. — The suggestion in the July number of the Reporter, that prisoners waiting their trial on a criminal prosecution, and alleged to be insane, should be sent to insane hospitals, in order that their mental condition may be correctly ascertained, has already been incorporated into the statutes of a neighboring state. In an act passed by the Maine legislature, at its last session, we find, among other provisions, displaying a degree of watchfulness over the rights and welfare of the insane, which does great credit to the intelligence and public spirit of that body, the following section:

"When any person shall be charged with a criminal offence, in this state, any judge of the court before which he or she is to be tried, on notice that a plea of insanity will be made, or when such plea is made in court, may, if he deems proper, order such person into the custody of the superintendent of the insane hospital, to be by him detained, and observed, until the further order of the court, in order that the truth or falsehood of the plea may be ascertained."

This is a humane and wise provision, calculated to promote the ends of justice, and remove the prejudice of the public against the plea of insanity in criminal cases. We hope the example of Maine will be speedily adopted by other states.

Case of Oliver Smith's Will.— Since our leader went to press, we have been informed that the statement contained in the note, in regard to a second suit, is not quite correct. We have received the following statement, which may be fully depended upon.

At a court of probate, holden in Northampton, on the first Tuesday in August, 1847, the judge issued an order to the eight towns, named in the third section of the will, to choose eight electors. Monday, August 30th, was appointed for the election. All the towns except Greenfield, complied with the order. The seven electors, thus chosen, met at Northampton, on the 6th of September, and elected Hon. Osmyn Baker, of Northampton, Hon. John Dickinson, Jr., of Amherst, and Austin Smith, Esq. (the executor) trustees.

To test the validity of their own

election, by an amicable suit, Messrs. Baker and Dickinson brought a bill in equity, at the law term of the supreme judicial court, for the county of Hampshire, in September.

This bill in equity set forth, that the complainants, with Smith the executor, had been chosen trustees by the electors duly appointed by seven towns, at meetings directed to be holden therein by the judge of probate. It prayed for an order on the said executor to transfer the estate of Oliver Smith to said trustees.

The executor formally pleaded a non-joinder of all the trustees, but did not rely on that point. He also contended, that the judge of probate could not *appoint meetings* of the towns, under the third section of the will, unless *within one year* after the decease of the testator. Mr. Smith died Dec. 22d, 1845. The will was finally approved in July 1847. The meetings of the towns for choice of electors were not called by the judge of probate till August 1847, more than one year from the testator's decease. The trustees were not therefore chosen according to the requirements of his will and the estate ought not to be transferred to them.

The decision of the court turned on the construction of the third section of the will. The first choice of electors by the beneficiary towns could not be holden within one year after the testator's decease by order of the judge of probate. The year had expired before the probate of the will. The judge was not empowered, in any other case, to call meetings. But he was authorized in certain cases, mentioned in the third and eighth sections of the will, to *appoint trustees*. This was the extent of his authority. The supreme court itself would not suffer the trust to fail for want of trustees; and, if it were necessary, could exercise its equity power and confirm the proceedings. But the exigency had not occurred. The towns were required annually in March or April, at meetings &c., to choose electors except the first year after the testator's decease. The first opportunity was given them in March or April 1847. They could hold meetings in March or April, 1848, and not forfeit the benefits of the will, from neglect, within *two* successive years, to choose an elector. The court therefore refused the prayer of the bill, and advised, as the property was safe in the hands of the executor, that the towns should wait till the next March or April meeting to choose electors, who should elect trustees, to whom the executor might transfer the Smith estate.

Notch-Pot.

It seemeth that this word Notch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 287, 176 a.

It is a matter of sincere regret to all the friends of the Law School at Cambridge, that Judge Kent felt obliged to relinquish his professorship. The following letter, in reply to one from the students, shows that he only left as a matter of duty, and against his own inclinations:

NEW YORK, Oct. 12th, 1847.

Gentlemen — I have read, with deeply gratified feeling, your communication in behalf of my former pupils of the Law School.

I did not willingly leave you and them, nor resign, without sincere and lasting regret, my tranquil and pleasing life in the University. It was an event, which left to me no choice — it was a point of duty admitting of no question, that compelled me to relinquish the pursuits, studies, duties and society, which made the last year the happiest of my life. Your well known names bring, vividly, before me the generous and ingenuous youth, whose unvarying courtesy, patient attention and unceasing application, made my instructions a source of daily pleasure, and my intercourse with them a subject of the most pleasing recollection.

I do not assume to myself the praise, which your warm feelings award. It is sufficient to me to be conscious of having earnestly endeavored to teach the just interpretation and nature of our laws, and to inculcate the true spirit of professional practice. Happy shall I be, if permitted to believe, that, amidst the scenes of life, which are immediately opening to you and your contemporaries, anything that I may have taught, shall be resorted to, in the moments of trial, difficulty or temptation, which occur to all, and shall be found to give "ardor to virtue, and confidence to truth."

Believe me, with the kindest remembrance, your friend and servant,

WILLIAM KENT.

To Messrs. Francis L. Batchelder, J. L. Bostick, R. B. Heath, C. F. Collier, Charles F. Burgin, Mellen Chamberlain.

The unsuccessful party under the following award, has requested its publication. We cheerfully give it place, though we feel perfectly satisfied that the award was correct.

A. & Co., commission merchants, received a consignment of fourteen cases of clocks, from B., a dealer in clocks, some time in June, 1847. On the 3d day of July, the firm stopped payment, and assigned their property to C. for the benefit of creditors. On the 19th day of the same month, the firm applied for the benefit of the Insolvent Act. The regular proceedings in insolvency were had,

and D. was appointed assignee. D., on taking possession, was unable to find six of the cases. It appeared, however, that they must have been included in a large lot, which were sold by C. while acting assignee, between the 3d and 19th of July, though the proceeds of all that was sold by C. were mingled together. If so sold, they were sold for $54. The question was, whether B. could claim the whole amount in an action against D. the assignee, or only a dividend out of the estate. The referee, considering the assignment to C. wholly void by the laws of Massachusetts, and that the proceeds of B.'s clocks could not be identified so as to be separated from the proceeds of the other sales by C., awarded that B. was not entitled to claim the value of the six cases of clocks against D., but was limited to a right to receive a dividend upon the sum of $54, (the value of the clocks) against the estate of A. & Co.

Writ of Right. — The following is taken from the foreign correspondence of a western newspaper, and is of some professional interest: "A very remarkable obituary, of great interest to all lawyers, and all who are interested in legal history in the United States, I cannot omit. On December 18th, 1846, died in the court of queen's bench, in Westminster Hall, London, the last of his race, now departed and gone forever, 'The Writ of Right.' On that day the last trial of a writ of right was had; henceforth this ancient mode of claiming lands in England is abolished. It was conducted in ancient feudal form, before the grand assizes. The case was Selby, demandant, *versus* Lowndes, tenant. The verdict was: 'The tenant hath more right than the demandant.' The event is historically interesting to all legal minds. Perhaps it is greatly to be lamented that the process of extermination has been adopted by the English legislature on legal matters instead of the process of improvement. This action of a writ of right was in many respects better than the action of ejectment; its only fault was being too prolix, too expensive, and too protracted. But these faults were incidents of the action, and did not necessarily belong to it; they might have been lopped off; it might have been made as expeditious and ready as an action of ejectment, and then a valuable mode of asserting a right would have been preserved in the courts of law. I believe that in some of the states of the Union the action of the writ of right still exists. In England it is gone, dead forever, on the day and date aforesaid."

Litchfield Law School. — Seven members of the class that graduated at Yale College in 1797, soon afterwards entered the Law School at Litchfield, and remained there one year, or longer. Of these, two destroyed themselves by intemperance; the other five received the honorary degree of LL. D.; one being a judge of the supreme court of the United States, another governor of his native state, and at different times a member of both houses of congress, and a third a senator in congress for two full terms. Another member of the same class, who left it during the collegiate year, and attended the lectures of the same Law School, became chancellor of New York, as well as senator in congress, &c. Both of the tutors of the class of 1797 attended those lectures, and became judges of the supreme court of the state, receiving also the degree of LL. D.

Judge Daly, of the New York Court of Common Pleas, has recently decided, that counsel are incompetent witnesses for their clients, on the authority of the English cases which the Law Reporter lately mentioned. The ground of the doctrine, as he seemed to understand it, is the advantage counsel who are their own witnesses, have in summing up, being able to recapitulate their evidence, and enlarge upon it from their own recollection of facts, although in appearance from their notes of the examination. This is certainly not sufficient ground in itself to support a decision, which is directly opposed to the tendency to do away with *all incompetency*, as in Lord Denman's act, not to speak of the growing inclination to compel parties to testify, or at least make sworn statements in their own cases, as in equity.

At the term of the United States circuit court, recently holden in Philadelphia, Grier, J. delivered an opinion in the case of Lombard et al. *v.* Bayard, of great importance to real estate holders. The question decided was, whether a judgment obtained by the plaintiffs against the defendant, in the above-named court, was a lien upon the real estate of the defendant, in Lancaster county. The justice decided in favor of the jurisdiction of the court throughout the entire circuit — so that, under this decision, a judgment obtained in either of the circuit or district courts of the United States, at Philadelphia, is a lien upon property in all of the counties composing the judicial district, in the same manner precisely as though the judgment had been obtained in the county court wherein the property is situated.

The office of the clerk of the court of common pleas, in Keene, N. H., was broken open on the night of the 20th September, and the records stolen. We understand that in a capital case, there pending, the prisoner consented to be tried by the copy of the indictment which had been previously furnished him. We do not know what course was pursued in the other cases, but we can conceive of serious difficulties having arisen.

The opinion of Redfield J., in the case of *Claflin* v. *Wilcox*, reported in our September number, and which has since been reported in Vermont, (3 Washb. 605.) corresponds with an opinion pronounced in the moot court of the Law School at Cambridge, by the late Mr. Justice Story.

Obituary Notices.

At New Orleans, Sept. 10, Hon. Richard Henry Wilde, aged 58. Mr. Wilde was a native of Baltimore, but removed, at an early age, to Augusta, Georgia, in which state he was admitted to the bar. The latter part of his life was spent in New Orleans. Mr. Wilde was successful in his profession. He was once the attorney-general of the state of Georgia; and, at his decease, he occupied the legal professorship in the university of Louisiana. He was also a distinguished statesman. He represented the state of Georgia in the United States House of Representatives, having been first elected in 1815, though his age barely exceeded the constitutional limit. After serving two years, he returned to his profession, and remained in practice (with the exception of another short service in congress, in 1825,) until 1827, when he was elected a third time. He continued to occupy that station till 1835, when he entirely abandoned public life. He acquired an enviable reputation in congress, being respected for his independence and industry. It was a saying of his that he had "found no party which did not require of its followers, what no honest man should, and no gentleman could, do." He exhibited great diligence and discrimination by the manner in which he mastered the most complicated questions of finance and political economy. His thorough and judicious examination of these matters is proved by his speeches on the Tariff, the Small Note Currency, and on the Removal of the Deposites.

Beside his eminent qualifications as a lawyer and a statesman, Mr. Wilde was a brilliant and accomplished scholar. He published several poetical effusions, which gained him great credit. But his studies were chiefly connected with Italian literature, his printed works being an elaborate notice of Petrarch, contained in a review of Campbell's biography of the poet; a letter to Mr. Paulding on Count Alberto's pretended MSS. of Tasso; and the "Conjectures and Researches concerning the Love, Madness, and Imprisonment of Torquato and Tasso," which appeared in 1842, and was the result of several years' study in Italy. It is understood that Mr. Wilde has also completed a life of Dante, though it has not yet been published.

Mr. Wilde died, very suddenly, of the fever, and his loss seems to have been severely felt. By all who had known him, whether as a scholar, a jurist, or a statesman, he had been admired for his social virtues and his gifted mind. As a lawyer, he was greatly respected, and the resolutions of his brethren of the bar bear honorable testimony to the salutary influence of his example.

At Boston, Oct. 7, Hon. Artemas Ward, aged 84, late Chief Justice of the court of Common Pleas of Massachusetts.

Chief Justice Ward graduated at Harvard College in 1783. He was a member of Congress from Massachusetts, from 1815 to 1819; and in 1821, he was appointed chief justice of the court of common pleas, which office he held nineteen years. During his judicial career he secured the respect of the bar by his sound learning and his eminent courtesy and kindness. At a meeting of the Suffolk bar, resolutions of respect were adopted, which were reported to the court, and ordered to be entered upon the records. The following remarks by Hon. Richard Fletcher, upon offering them, will show the general feeling:

"Mr. Chairman:—The decease of the late Chief Justice Ward, is an event which must be deeply felt by the members of this bar; and I presume there can be but one feeling and one sentiment, as to the propriety of our offering some public testimonial of our respect for his memory. He had reached an advanced age, and his long life had been usefully and honorably spent. As a man, in all the relations of domestic and social life, he sustained a most exemplary and elevated character. As a member of our national legislature his duties were faithfully and ably performed. As a lawyer he acquired and maintained a high rank. But it is in his judicial character that he is most known and more particularly remembered by the present members of the bar.

"He came to the bench as chief justice of the court of common pleas, under its present organization in 1821. It will, I presume, be universally admitted, that he was eminently qualified for the duties of that office. He had a matured and established character. He had ample stores of legal learning, and habits of business admirably adapted to the great amount of details in the business of his court. He had great patience and equanimity of temper—qualities of great value, in any station in life, but essential to a judge. His conduct on the bench was marked by uniform courtesy and kindness—crowning qualities of any judge of any court, without which any judge of any court must lose most of his dignity, and much of his usefulness."

At his seat, The Firs, Hampstead, England, September 25, the Right Hon. Sir John Bernard Bosanquet.

Sir John was descended from an ancient family in Languedoc, who sought refuge in England on the Revocation of the Edict of Nantes. His father, Samuel Bosanquet, Esq. was Governor of the Bank, A. D. 1792; and presided, during the same year, at the mem-

orable meeting of the merchants, bankers, and traders of the city of London, holden for the purpose of declaring their attachment to the British constitution, in opposition to the radical doctrines of the French Revolution.

Sir John was educated at Christ Church College, Oxford ; was called to the bar in 1800; obtained the coif in 1814; and became King's Sergeant in 1827. He sat on the bench of the court of common pleas, from 1830 to 1842; and in 1835 and 1836 was one of the commissioners entrusted with the charge of the great seal.

While upon the bench, Sir John was respected for his sound learning, and attachment to the principles of the constitution. He is also favorably known to the profession in this country as one of the reporters for eleven years of the decisions in the C. B., Exchequer Chamber, and House of Lords.

At Hagerstown, Md., Oct. 27, Hon. Thomas Buchanan, aged 78, late associate judge of that judicial district. Judge Buchanan held court on the same day, and heard several elaborate arguments. He was attacked with apoplexy on his ride home, in the evening, and expired instantly.

Judge Buchanan succeeded the Hon. Roger Nelson, and was elevated to the bench on the 5th of May, 1815. His memory will long be affectionately cherished by his fellow citizens.

"Possessing to the hour of his death a clear judgment and a vigorous intellect, combined with a probity which has never been tarnished, all who have appeared before him in his official capacity, have felt an abiding confidence that they would receive naught but justice at his hands. To the members of the bar, from the youngest to the most experienced, he has ever been a father, and they have uniformly approached him with the same confidence and ease which would characterize the approaches of a son to a parent. Deep has been the impression of his death, and long will his memory be cherished by those upon whose life, liberty and property he has, in days past, been called to judge."

At Worcester, Mass., Oct. 2, Hon. Joseph G. Kendall, aged 59, clerk of the courts for the county of Worcester. Mr. Kendall was the son of the late Jonas Kendall of Leominster. He graduated at Harvard College in 1810, with distinguished honor, and afterwards, rom 1812 to 1819, was connected with the university, as tutor in Latin. From 1829 to 1833, he represented the northern district of Worcester county, in the congress of the United States. After leaving congress, he was appointed clerk of the courts, and removed to the town of Worcester, where he resided until his decease. Mr. Kendall enjoyed a good reputation in his profession, and was beloved and respected by all who knew him. He was a man of good talents, of refined and cultivated taste and uncommon purity of character. He led a quiet and unobtrusive life; but there are few whose loss will be more keenly felt in the community in which he dwelt.

At his residence in Fairfield District, S. C., October 10th, Hon. William Harper, one of the chancellors of the state.

Chancellor Harper was appointed in 1835, and continued in office till the time of his decease. He has always been considered one of the most eminent jurists in the state. Nor was his judicial and professional reputation confined to South Carolina, but he had become generally known by his exact legal learning, and the comprehensive character of his mind. In private as well as public life, he was universally beloved. He retained throughout the simplicity of youth, and all who knew him will bear witness to his kindness and generosity.

His loss was severely felt. The event was announced at the courts sitting at Charleston, and they immediately adjourned after paying an appropriate tribute to his memory.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Andrews, Elbridge G.	Boston,	Trader,	Sept. 27,	Bradford Sumner.
Barney, Adolphus,	Taunton,	Yeoman,	" 14,	Horatio Pratt.
Barry, Charles,	Boston,	Clerk,	" 30,	Bradford Sumner.
Beal, George, Jr.	Boston,	Merchant,	" 20,	Ellis Gray Loring.
Bearce, William P.	Randolph,	Bootmaker,	" 18,	Sherman Leland.
Beatley, James R.	Braintree,	Bootmaker,	" 18,	Sherman Leland.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Bradford, S. S. et al.	Braintree	Shoe Dealers,	Sept. 17,	Bradford Sumner.
Brown, Edward H.	Lynn,	Trader,	" 22,	David Roberts.
Bugbee, Henry E.	Webster,	Cordwainer,	" 3,	Isaac Davis.
Buttrick, Grosvenor,	Lowell,	Machinist,	" 2,	Josiah G. Abbott.
Caldwell, Mary R.	Malden,	Trader,	" 2,	Josiah G. Abbott.
Chase, John H.	Boston,	Shoe Manufacturer,	" 27,	Ellis Gray Loring.
Coffin, Amos,	Newbury,	Shipwright,	" 21,	Ebenezer Moseley.
Crocker, S. M. Jr.	Milford,	Laborer,	Oct. 22,	Chas. W. Hartshorn.
Crowell, Hosea,	Boston,	Shipwright,	Sept. 20,	Bradford Sumner.
Davis, John,	Lawrence,	Teamster,	" 7,	James H. Duncan.
Dean, Asahel,	Boxborough,	Trader,	" 25,	Sherman Leland.
Dean, Merrick S. P.	Rutland,	Boot Manufacturer,	" 8,	B. F. Thomas.
Dearing, Thomas,	Charlestown,	Carpenter,	" 24,	George W. Warren.
Dodge, George B.	Concord,	Silk Dyer,	" 18,	George W. Warren.
Dudley, Albion S.	Boston,	Dentist,	" 9,	Bradford Sumner.
Dunham, Asa,	Warren,	Carpenter,	" 6,	Isaac Davis.
Ellis, Nathan S. et al.	New Bedford,	Traders,	" 23,	Oliver Prescott.
Farwell, Enos H.	Lawrence,	Carpenter,	" 20,	James H. Duncan.
Ferney, T. H. et al.	New Bedford,	Traders,	" 23,	Oliver Prescott.
Foster, Daniel,	Boston,	Clergyman,	" 18,	Bradford Sumner.
Frost, W. H.	Lowell,	Cabinet Maker,	" 8,	Josiah G. Abbott.
Frothingham, Nathaniel,	Boston,	Trader,	" 6,	Willard Phillips.
Gates, Samuel J.	Lowell,	Carpenter,	" 17,	Bradford Russell.
Geulick, Reuben L.	Boston,	Carpenter,	" 9,	Bradford Sumner.
Gilbert, Charles,	Boston,	Trader,	" 17,	William Minot.
Glidden, David S.	Lawrence,	Carpenter,	" 6,	James H. Duncan.
Gould, Eben P.	Boston,	Laborer,	" 9,	Bradford Sumner.
Green, James A.	Stoneham,	Butcher,	" 6,	George W. Warren.
Griffin, Daniel J.	Worcester,	Carpenter,	" 23,	Henry Chapin.
Hall, David H.	Fitchburg,	Harnessmaker,	" 15,	Henry Chapin.
Hatch, Abial H.	New Bedford,	Laborer,	" 11,	Oliver Prescott.
Hill, John,	Upton,	Yeoman,	" 15,	Chas. W. Hartshorn.
Hilliard, Samuel,	Boston,	Innkeeper,	" 25,	Bradford Sumner.
Hills, Joel,	Boston,	Trader,	" 8,	Bradford Sumner.
Howard, Everett,	Lowell,	Laborer,	Aug. 28,	Josiah G. Abbott.
Johnson, George W.	Boston,	Mason,	Sept. 18,	Ellis Gray Loring.
Kelley, Nathan,	Dennis,	Mariner,	" 22,	Nymphas Marston.
Kimball, Welcome S.	Lowell,	Laborer,	Aug. 14,	Josiah G. Abbott.
Little, Moses M.	Boston,	Merchant,	Sept. 22,	Bradford Sumner.
Logan, John,	Boston,	Stone Cutter,	" 3,	Bradford Sumner.
Lord, David F.	Boston,	Mason,	" 29,	Bradford Sumner.
Lovejoy, Noah,	Lowell,	Cabinet Maker,	Aug. 11,	Josiah G. Abbott.
Martin, Jeremiah B.	Lawrence,	Laborer,	Sept. 7,	James H. Duncan.
Melvin, Adonis L.	Charlestown,	Carpenter,	" 8,	George W. Warren.
Melvin, Alonzo A.	Boston,	Printer,	" 1,	Willard Phillips.
Merchant, Henry H.	Edgartown,	Master Mariner,	" 28,	Theod. G. Mayhew.
Millett, Joseph R.	Andover,	Housewright,	" 4,	John G. King.
Moor, Joshua,	Andover,	Yeoman,	" 4,	John G. King.
Nelson, Horatio G.	Boston,	Merchant,	" 20,	Ellis Gray Loring.
Otis, Roland L.	Worcester,	Mason,	" 6,	Isaac Davis.
Palmer, Stephen J.	Taunton,	Trader,	" 29,	Horatio Pratt.
Pepper, Edmund S.	Salem,	Housewright,	" 7,	David Roberts.
Pomeroy, Isaac, Jr.	Lawrence,	Teamster,	" 9,	James H. Duncan.
Pratt, Asa T.	Braintree,	Housewright,	" 16,	Sherman Leland.
Ripley, D. S. et al.	Boston,	Shoe Dealers,	" 17,	Bradford Sumner.
Rota, Samuel,	Boston,	Piano-Forte Manuf'r,	" 23,	Bradford Sumner.
Rounds, Joseph, Jr.	Dartmouth,	Mariner,	" 23,	Oliver Prescott.
Sherburne, George W.	Boston,	Trader,	" 11,	Bradford Sumner.
Sisson, George H.	Lynn,	Carriage Painter,	" 6,	David Roberts.
Spencer, Warren,	Boston,	Truckman,	" 28,	Ellis Gray Loring.
Stanwood, Charles H.	Newburyport,	Housewright,	" 14,	David Roberts.
Stevenson, John,	Quincy,	Bootmaker,	" 14,	Nath'l F. Safford.
Towne, Theophilus L. F.	Topsfield,	Laborer,	" 17,	David Roberts.
Watson, Charles P.	Lowell,	Carpenter,	Aug. 31,	Josiah G. Abbott.
Whitman, Moses,	Woburn,	Currier,	Sept. 25,	George W. Warren.
Wilkins, Levi,	Westford,	Cordwainer,	Aug. 10,	Josiah G. Abbott.
Yeaton, Ebenezer,	Lawrence,	Blacksmith,	Sept. 11,	James H. Duncan.
Young, David J.	Lowell,	Laborer,	Aug. 31,	Josiah G. Abbott.